No. 260

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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1949

JAMES SHEPPARD POTTS and ADAM EMPIE POTTS,

PETITIONERS,

vs.

J. K. RADER, as administrator, et al.,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF AND APPENDIX IN SUPPORT THEREOF

JAMES SHEPPARD POTTS,
ADAM EMPIE POTTS,
Petitioners.

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Consecutive Topical Outline

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Abbreviations: (R. . . .) refers to page numbers in the printed record in this cause in the Supreme Court of the United States; (T. . . .) refers to page numbers in the typewritten transcript and (ST. . . .) to supplemental transcript of record sent up by the Jefferson Chancery Court to the Supreme Court of Arkansas.

SUPREME COURT
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OCTOBER TERM, 1949

JAMES SHEPPARD POTTS and ADAM EMPIE POTTS,

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vs.

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

May it Please the Court:

The petitioners, James Sheppard Potts and Adam Empie Potts, hereby pray that a writ of *certioarai* issue to review the judgments of the Supreme Court of Arkansas ordered to be entered in the above cause on

April 18, 1949 (Record 183-184), motion for re-hearing being denied May 16, 1949 (Record 194), and this petition is being filed in the Supreme Court of the United States prior to August 14, 1949.

Opinion Below

The opinion of the Supreme Court of Arkansas is reported in 219 S. W. (2) 769 (Advance Sheets No. 4, May 31, 1949).

Jurisdiction

The judgments of the Supreme Court of Arkansas, as stated, were ordered to be entered on April 18, 1949, and petition for re-hearing was denied by that Court on May 16, 1949.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Acts of February 13, 1925 and January 31, 1928; Tit. 28 FCA, Sec. 344.

Questions Presented

(a) The abuse of the trial court's discretion in denying the petitioner, Adam Empie Potts (Colonal U. S. Army) in the litigation involved, the protection to which he was entitled under the Soldiers' and Sailors' Civil Relief Act, 1940, §§ 1 et seq. 201 (50 USCA Appendix §§ 501 et seq. 521), and in refusal of such Court to stay proceedings under said Act, and holding that petitioner's application for relief was made solely for the purpose of delay. The action of the trial court in both particulars having been affirmed by the Supreme Court of the State of Arkansas in the opinion now sought to be reviewed.

(b) In the refusal of the trial court to recognize established canons of real estate law prevailing in the State

of Arkansas which recognize the devolution of ancestral estates, and in authorizing the sale of real estate susceptible of partition, and in entertaining partition of the premises involved before determination as to conflicts in title of such real estate.

(c) That the judgment of the court complained of in denying the petitioner Adam Empie Potts a stay in the proceedings involved, to which he was clearly entitled under the provisions of the Soldiers' and Sailors' Civil Relief Act, *supra*, constituted a denial of due process and equal protection of the law as guaranteed to him under the Constitution of the United States of America, as claimed and relied upon by this petitioner (R. 194).

STATEMENT OF THE CASE

In 1870 James Sheppard, the grandfather of your petitioners, a resident of Henrico County, Virginia, died testate, seized and possessed of a valuable tract of land on the Arkansas River, in Jefferson County, Arkansas, this cotton plantation then and now known and described as "Sheppard Island", consisting of approximately 1,875 Acres. The record, page 49, shows that, under an order entered by the Chancellor of the Chancery Court of Jefferson County, dated June 30, 1944, Chris L. Wright was appointed by the Court to make a complete examination and survey of the Sheppard Island Plantation, and in pursuance of the direction, a report was made in accordance with the direction given, which is found in the transcript commencing at page 50, the report having been filed on July 13, 1946. Special reference is made on this report, which among other things shows that at the time of the inquiry there was located upon the plantation some seventeen (17) dwellings, or tenants' houses (R. 50, 67-68). The report further shows that the prop-

erty in question had been listed on the tax books and taxes thereon paid since the time of the death of the ancestor in 1870 in the name of his estate (R. 54). Thus the alleged "deed" relied upon by the respondents was ignored by the tax authorities.

It appears from the will of the common ancestor involved, James Sheppard (R. 133-135), that he desired his executors therein named, being two in number, to sell the Arkansas property "as soon after my (his) death as they deem to the interest of my estate, and that the proceeds of sale be equally divided among my wife and children, my wife taking an equal share with each of my children so that her share shall be equal to the share of one of the children". The testator names Benjamin F. Richardson, as executor of all property in Arkansas, and Peter W. Grubbs, of Richmond (Va.) executor of all property in Virginia, the will providing, however, a limitation in this language:

> "My two executors are to unite and concur in the sale of my property in the State of Arkansas".

It is definitely established by the record, and in fact conceded by all parties concerned, and in the opinion of the court now sought to be reviewed (R. 184), that no deed or conveyance of any kind was made by the two executors just mentioned, nor is there any contention made by any party claiming interest that any conveyance of any character was made by said executors, or either of them, or any successor of such, to any stranger in title, as to the land involved.

On the 22nd day of December, 1876, for and in consideration of the sum of ten dollars ($10.00) paid by James Sheppard's widow and four children, namely, "Annie E. Shep*herd*, A. Empy Shep*herd*, Belle G. Shep-

herd, Katie E. Shep*herd*, Jr., and Katie E. Shep*herd*, Sr.", an *ex parte* quit-claim "deed" (R. 137) was "executed" to said parties by B. F. Richardson, acting alone as "Executor of Est. of James Shep*herd*, dec'd". That said quit-claim "deed" carried title in fee to the parties named therein was the contention of those strangers who denied to your Petitioners and their brother, as an ancestral inheritance, the title to the property concerned. The Court will observe that the opinion of the learned judge of the Supreme Court of Arkansas does not follow nor sustain such contention of said strangers (the Appellees) but, to the contrary, rests upon the ground of equitable estoppel (R. 185) the denial of Petitioners' absolute title to the property herein concerned; and this, though there is nothing in the record to show nor to justify such estoppel, even if legal title to real estate under any circumstances could pass through equitable estoppel.

Hence, it appears obvious that this is a case in which the Appellees (respondents herein) are attempting to partition, and to sell for their own benefit, valuable lands in which they have no interest and to which they have no title.

It was and is the contention of the three grandsons of James Sheppard (the Petitioners and their brother, Joseph Schoolfield Potts, Jr.) that, in the first place, there never has been any actual change in the fee simple title of the Sheppard Island Plantation subsequent to the decease of their ancestor, James Sheppard, in 1870; that, upon decease of their uncle "Empie Sheppard" (A. E. Sheppard), in November 1934, under the recognized doctrine of Ancestral Estates, as such rule or canon of law always has been recognized and followed as statute law in the state of Arkansas, this property then passed

to the class comprising the three children of Mrs. Isabelle Sheppard Potts (sister of said Empie Sheppard) and to A. B. Guigon, Jr. (only child of Kate Sheppard Guigon); that said A. B. Guigon, Jr., departed this life in October 1936, intestate as to this property, which then vested solely in aforesaid three Potts brothers.

But even if this position of your Petitioners could be questioned, they certainly had a right to demand an adjudication by the court as to the question presented to the court, before the chancellor could proceed either to partition or to sell the Estate herein concerned; the presumption being in favor of the heirs at law, and the burden of proof being upon the strangers claiming interest in such ancestral property. In the present instance, such adjudication was denied by the Supreme Court of Arkansas (*Potts* v. *Rader*, 219 S. W. 2d, 769-770).

REVIEW OF PLEADINGS

On October 20, 1937, a group of strangers claiming through alleged "wills" of A. E. Sheppard (son of said James Sheppard) and A. B. Guigon, Jr. (a grandson), both deceased, unmarried and without issue, brought suit in the Jefferson County Chancery Court in Arkansas, for "partition" of this land. The style of said suit was "Lisa Guigon and J. K. Rader, as administrator *de bonis non cum testamenta annexo* of the Estate of Adam Empie Sheppard, deceased, and Norman L. Flippen as administrator *cum testamenta annexo* of the Estate of A. B. Guigon, Jr., deceased, Plaintiffs, v. James Sheppard Potts, Adam Empie Potts, Joseph Schoolfield Potts, Jr., Sheltering Arms Hospital of Richmond, Virginia, Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women, Defendants" (R. 1).

Adam Empie Potts and James Sheppard Potts filed their separate answers to said complaint, on November 17 and 18, 1937 (R. 5-12), denying the claims of the plaintiffs and claiming the entire property for themselves and their brother, Joseph Schoolfield Potts, Jr., as the only surviving descendants and lawful heirs of their grandfather, James Sheppard, (A. B. Guigon, Jr., then being deceased).

For several years thereafter, the stranger plaintiffs and the "charities" mentioned fought among themselves, changed their positions frequently, each manoeuvering to get as large a share as possible from said property of James Sheppard (R. 33-37). Said stranger plaintiffs (now respondents to this petition) carried their internecine strife to the Supreme Court of Arkansas (to which suit the petitioners herein were not parties) through which Court it finally was settled *among themselves*, by decree on mandate, dated October 10, 1941 (R. 40). This ex parte litigation, consuming some two years, terminated just before "Pearl Harbor". Surely, this delay can not be charged against the Petitioners. Then the stranger plaintiffs again joined forces to take for themselves two-thirds of the ancestral property of the descendants and heirs of James Sheppard.

The record shows that this delay, from October 1937 to receipt of mandate in case of *Sheltering Arms* v. *Shimberger* (201 Ark. 780, 146 S. W. (2) 921), on Oct. 10, 1941 (R. 40), and subsequent delays were brought about by the then plaintiffs themselves, to serve their own personal interest; that James Sheppard Potts and Joseph Schoolfield Potts, Jr., gave testimony by deposition on April 20, 1942 (R. 141-145); that the then plaintiffs (now respondents) took their depositions on October 9, 1942 (R. 145); that on June 17, 1943 (R. 47), motion for stay of action under Soldiers and Sailors Civil Relief

Act of 1940, was denied by the trial court to Colonel Adam Empie Potts, though it was shown that he was a necessary witness, who at all times had been on active duty with the armed forces, in preparation and in actual combat duty during and after the Jap raid on Pearl Harbor on December 7, 1941. (The war records show that Colonel Adam Empie Potts and his command at Schoofield Barracks were credited with the first Jap plane shot down at Pearl Harbor.) The Court again denied his motion for stay under said Act on September 7, 1943. (R. 48).

As one of its reasons for denying the first motion for stay of action, the trial court states "that the lands are susceptible of partition, having regard both to quality and quantity" (R. 47) and that "no prejudice can or will result". Yet the court is shown subsequently to have ordered a sale of the property, on motion of the herein respondents (R. 112-127).

On June 30, 1944 (R. 49), the court ordered a capable engineer to make a detailed survey of said Sheppard Island Plantation, ostensibly for the purpose of "partition", at a cost of $2,000.00 or more. This survey definitely showed that the lands were readily susceptible of partition, into thirds or ninths, or into any size parcels which might be found necessary in partitioning same. The report was filed July 13, 1946 (R. 51-88).

On September 2, 1947, the court entered a decree for partition in kind and appointed three Commissioners for said purpose. (R. 88-110). Seven days later the court set aside this order and directed the sale of the property in its entirety (R. 112).

On October 3, 1947, Colonel Adam Empie Potts again filed motion to vacate decree and order of sale and to stay action. (R. 114-116).

He again urges, for the third time, that his military service impairs his ability to be present or to make proper defense and to represent his interests properly; he follows this up on October 24, 1947, by filing notice, publishing to any and all prospective bidders that he would claim his rights under the Soldiers and Sailors Civil Relief Act (R. 119).

The record shows that various exceptions and motions filed (R. 113-118) and testimony taken (R. 146-158), important in their scope and nature, were not considered by the Supreme Court of Arkansas, because the trial court had ignored, disregarded, the Supreme Court's repeated writs of certioarai to supply the record of such testimony and because the trial court had delayed sending up this portion of the transcript of record; although the Supreme Court of Arkansas had received this and all parts of the record and had the entire record before it for six months before the cause came on to be considered and heard in that court.

This testimony was vitally important, as it shows necessity for stay of action under the Soldiers and Sailors Civil Relief Act, to enable Colonel Adam Empie Potts to protect not only his own interests but through his testimony and records to protect the interests of his brothers also. Further, from testimony of the Commissioners appointed by the trial court to partition the property in kind, said Commissioners "were not particularly trying to divide the land" (R. 154—lines 15-17)—that they had set a totally inadequate price of $46,500.00 (R. 153) upon this land which admittedly was producing "over $30,000 a year" (R. 155); admittedly 270 bales (about 600 pounds each) at 35 cents a pound (R. 155), which will approximate more nearly $60,000—that it might be sold to a purchaser of their own choice at this previously

agreed totally inadequate price! The Supreme Court of Arkansas refused to admit and to consider this and other very important and very necessary testimony showing the fraud being perpetrated upon this petitioner and his brothers—and, in the final analysis, a fraud upon the general public.

It is a matter of record (R. 127-128) that an attempted "sale" of said Sheppard Island property was held on February 16, 1948, that one Hamilton McNeill (R. 131) was the only bidder and at the *previously agreed* inadequate price of $46,500! (R. 131). Petitioner filed written exceptions to order of sale and to any sale or attempted sale of said Sheppard Island Plantation (R. 132).

After the hearings, on October 24, 1947, this petitioner ordered from the Jefferson Chancery Court, in Jefferson County, Arkansas, a transcript of the *complete record* in said cause, to perfect an appeal to the Supreme Court of Arkansas, said appeal having been granted in the decree entered herein by the trial court. Thereafter, this petitioner made repeated efforts to secure said complete transcript of record, receiving repeated promises but no transcript. Finally, on February 25, 1948 (R. 159), petitioners applied to the Supreme Court of Arkansas and a writ of certiorari was issued ordering the "full, true and complete transcript of the record and proceedings" to be sent up *within the prescribed time.* Other writs followed; and, after considerable delay, a portion of the record was furnished. Other writs followed for the diminution, which to suit the convenience of the lower court, arrived on or about October 18, 1948, with the misstatement that it had been withheld on Appellant's order (R. 163). (It is inconceivable that an appellant would order withheld the very portion of the record

most vitally important to his cause, embracing testimony taken especially for use in his appeal—and particularly when he had had issued numerous writs of certiorari to bring up this very evidence in full, true and complete.

In the meantime, the appellees (respondents herein) had filed a motion with the Supreme Court of Arkansas to dismiss the cause (R. 169); but, on October 18, 1948, said Supreme Court entered a *per curiam* order stating that the cause would be heard in its entirety, after all the pleadings had been filed (R. 182). This order is highly important when considered with the subsequent action of the Arkansas Supreme Court in disregarding, under its Rule Five (R. 185), the testimony and evidence in the transcript of record which had been brought up on said Supreme Court's own writs of certiorari (R. 159, 161, 162, 166) and which record, therefore, actually was before said Court, by its own action.

Upon entry of said *per curiam* order by the Arkansas Supreme Court, petitioners (appellants) immediately prepared an extensive abstract of the record (as required by the Arkansas Supreme Court and supporting briefs and had them printed and filed in the Supreme Court of Arkansas within the time provided by statute and in full compliance with the rules of that court. The appellees, who all along had access to the entire original record failed to file their answer brief within the prescribed time nor for some three months thereafter.

ERRORS RELIED ON

1. The Supreme Court of Arkansas erred in denying Appellants a trial on the merits of their cause, thereby denying to said Appellants their inherent right to due process and equal protection of the law, as guaranteed them by the Constitution of the State of Arkansas and

by the Fourteenth Amendment to the Constitution of the United States of America (R. 190).

2. The Supreme Court of Arkansas erred in denying to Colonel Adam Empie Potts his rights under the Soldiers and Sailors Civil Relief Act of 1940, as enacted by the Congress of the United States, made and provided in and for such cases, thereby denying him his inherent rights of due process and equal protection of the law, as guaranteed him by the Constitution of the State of Arkansas and by the Constitution of the United States of America.

3. The Supreme Court of Arkansas erred in assuming that "The record justifies the conclusion that the appeal to the Federal statute is made for the purpose of delay". (R. 186). When the entire record shows exactly to the contrary, by testimony that is not contradicted (R. 141, 143, 145, 147).

4. The Supreme Court of Arkansas erred in assuming that Colonel Adam Empie Potts was represented by "local counsel of unquestioned ability" in the lower court (R. 187), when, on the contrary, the record shows that Colonel Potts filed his own pleadings, was *not* represented by counsel (R. 143), and that his brother's local counsel, as a matter of accommodation, had filed motions for Colonel Potts to protect his interests by stay of action under the Soldiers and Sailors Civil Relief Act and had acted for him in this one capacity for the purpose of a stay of action only; said local counsel having filed no pleadings as to the merits of the case and having taken no steps other than for said stay of action, to which Colonel Potts is lawfully and rightfully entitled.

5. The Supreme Court of Arkansas erred in assuming in its opinion (R. 186) that Colonel Adam Empie Potts

depended on his brother to defend his title to the property herein concerned, when there is nothing in the record to support such an assumption and the entire record shows that Colonel Potts has made every effort for a stay of action under the Soldiers and Sailors Civil Relief Act (R. 47-48) to enable him to attend personally and to defend his own disputed title to this property inherited direct from his grandfather, James Sheppard.

6. The Supreme Court of Arkansas errer in affirming the decree entered by the Jefferson Chancery Court in this cause, when there was nothing in the record to support said decree.

7. The Supreme Court of Arkansas erred in rendering a decision contrary to established law and decisions of the State of Arkansas and contrary to the rights and interests of the lawful heirs and owners of the property concerned in this cause.

8. The Supreme Court of Arkansas erred in assuming in its opinion (R. 185) that the lawful heirs may be defeated and divested of their inherent rights and lawful inheritance, through acceptance, laches and acquiescence (as if such were possible), when, on the contrary, Appellants have prosecuted their claims vigorously ever since this ancestral property vested in them upon decease of all the previous class in being (those who were living, in being, at the time when the will of James Sheppard was executed).

9. The Supreme Court of Arkansas erred in assuming that title to real estate may be passed by equitable estoppel, in absence of a valid conveyance (R. 185).

10. The Supreme Court of Arkansas erred in assuming this cause to be "a simple partition suit" (R. 186), when the entire record shows that appellants are claiming full

ownership for the heirs-at-law of James Sheppard and that this entire cause is based upon that contention, the disputed title being the principal issue in this whole matter (R. 5-6).

11. The Supreme Court of Arkansas erred in assuming in its opinion (R. 185) that Appellants claim inheritance from their Grandfather James Sheppard "under their Mother's will", when the record throughout (R. 2; 170) shows that their Mother, Mrs. Isabelle Sheppard Potts, departed this life *intestate*, that she *left no will*; and said court erred in assuming that she and her mother and sisters and brother had a fee simple title in said Sheppard Island Property by virtue of any alleged "deed" the validity of which never has been established; and said court erred in assuming that Appellants claim "part of the land in reliance upon the deed and at the same time claim the rest upon the theory of its invalidity", when there is nothing in the record to support such a decision but that the entire record shows Appellants charge that the "deed" attempted by B. F. Richardson is and always has been null and void.

12. The Jefferson Chancery Court and the Supreme Court of Arkansas erred in that the Jefferson Chancery Court entered a decree and order for partition and sale of a valuable Plantation ("at a previously agreed inadequate price"—R. 112, 128, 131, 132), without trial on the merits of the cause, and the Supreme Court of Arkansas affirmed that decree, with no evidence to sustain that Appellees have any interest in the real estate concerned in the cause nor title to any part of said property.

13. The Supreme Court of Arkansas erred in affirming a decree (R. 183-187) for sale of lands when the title is in dispute and which dispute as to title never has been

brought to trial on the merits of the cause and which never has been passed upon by the trial court on the merits.

14. The Supreme Court of Arkansas erred in affirming a decree for sale of lands for partition when such lands had been proven capable of partition in kind (as recently held by said Supreme Court of Arkansas in *Sheltering Arms Hospital* v. *Shimberger*, 146 S. W. 2d, 921; 201 Ark. 780 (which decision has been cited by the respondents).

15. The Supreme Court of Arkansas erred in refusing to consider the full, true and complete transcript of the record and proceedings in this cause, brought up on its own writs of certiorari, over which only said court had control.

16. The Supreme Court of Arkansas erred in entertaining or considering Appellees' motion to dismiss under Rule Five, as lateness of delivery of the transcript was due to the trial court's own failure to comply with the several writs of certiorari issued to it by said Supreme Court and to the failure of said Supreme Court of Arkansas to enforce its own commands issued to the Jefferson Chancery Court, over which Appellants had no control.

17. The Supreme Court of Arkansas erred in affirming the decree of the Jefferson Chancery Court, on Appellees' motion to dismiss under Rule Five, on mere statement of Appellees' counsel and without evidence to support it. (R. 169-182).

18. The Supreme Court of Arkansas erred in its failure to consider the cause of Appellants, who had filed a respectful and creditable brief, well within the lawful

and proper time for filing after receiving transcript of the record.

19. The Supreme Court of Arkansas erred in not rejecting, on the court's own motion, the answer brief of Appellees, which said answer brief was filed herein *three months later than the time prescribed by law*; the Appellees, by their own line of reasoning, "toying" with the court; and especially as said answer brief of Appellees did not confine itself to the issues of the case nor to the issues of law nor of fact and truth, it did not answer Appellants' brief but was intemperate in tone, vituperative and gratuitously scurrilous and insulting, filled with misleading generalities and misstatements and unreason (as also was Appellees' motion to dismiss under Rule Five). (R. 169-182).

20. The Supreme Court of Arkansas erred in sustaining Appellees' motion to strike the evidence which would not sustain the decree of the lower court, and in "assuming" that such evidence "supported the chancellor's action" (R. 185).

21. The Supreme Court of Arkansas erred in taking the position that the burden is on the recognized heirs-at-law to prove their claims to ownership of inherited ancestral real property and that the presumption of ownership favors strangers attempting to divest such heirs-at-law of such property inheritance.

22. The Supreme Court of Arkansas erred in misquoting citations of Virginia cases of Appellants (R. 187), when the holding of the Virginia Supreme Court was exactly to the contrary (that there was no evidence to show an intention to delay).

23. The Supreme Court of Arkansas erred in that none of the authorities cited in its opinion in this cause (R.

184-187) are in point with the case or have any bearing upon it and have no place in it.

24. The Supreme Court of Arkansas erred by its failure to consider the merits of this cause concerning ancestral property of James Sheppard, which has remained in his name and in possession of his lineal heirs continuously, the possession not having changed in nearly a hundred years; and for failure of said court to dismiss Appellees' case, upon its own motion, and for its failure to reverse the decree of the Jefferson Chancery Court and to remand this cause for trial on the merits or with appropriate direction.

25. The Supreme Court of Arkansas erred in rendering a decision the opinion in which shows it to be based upon assumptions only (R. 183-187), which assumptions are entirely foreign and irrelevant to the record and true facts of the case and completely contrary to the law and the evidence.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

1. It is the contention of petitioners that they and their brother are the sole owners of Sheppard Island Plantation, in Jefferson County, Arkansas, by direct descent from their grandfather, James Sheppard, and that the "deed" by which one executor attempted to convey this property was unlawful and has been void from its very inception; therefore, in depriving these petitioners and their brother of their property, the Arkansas courts are violating the Constitution and laws of Arkansas and thereby are violating the due process and equal protection provisions of Article Fourteen of the Constitution of the United States of America.

2. Denial of stay of action to Colonel Adam Empie

Potts, under the Soldiers and Sailors Civil Relief Act was to deny him and his brothers their inherent right to due process of law and equal rights and equal protection under the law, guaranteed by Article Fourteen of the Constitution of the United States of America.

3. The Supreme Court of Arkansas, by its arbitrary refusal and failure to consider pertinent portions of the testimony, on the basis or pretext of such not being a part of the record, when such was under the control and in the possession of that Court as a consequence of its own writs of certiorari (R. 159, 161, 162, 166), shows prejudice and error on the part of the Court.

4. Sheppard Island Plantation is the ancestral heritage of the petitioners and their brother and as such is sacred to them, having belonged to their family for approximately a hundred years; and, as shown by the record, it has a minimum monetary value of $46,500 (R. 112, 128, 132).

5. In this cause the decision of the Supreme Court of Arkansas appears to have violated the statutes and the Constitution of the State of Arkansas as well as having violated the Statutes and Constitution of our United States of America; it appears arbitrary and prejudiced, which this petitioner believes the Honorable Supreme Court of the United States will discover upon a proper review of said cause, to the end that it will see fit to reverse said decision of the Supreme Court of Arkansas and to remand this said cause with appropriate direction.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the Supreme Court of Arkansas, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named, a full and com-

plete transcript of the record and all proceedings in the cause entitled on its docket as *James Sheppard Potts et al* v. *J. K. Rader, Administrator, etc., et al,* and that the decree of the Jefferson Chancery Court, of Jefferson County, Arkansas, heretofore affirmed by the Supreme Court of Arkansas, may be reviewed and reversed by this Honorable Court, and that these petitioners and their brother may have such other and further and general relief in the premises as shall be meet and just and in accord with Equity and Good Conscience; and this your petitioners prayeth and ever will pray.

JAMES SHEPPARD POTTS,

ADAM EMPIE POTTS,

Petitioners.

August 10, 1949.

ALEXANDER H. SANDS,
Counsel for Petitioners,
American Building,
Richmond, Virginia.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Supreme Court of Arkansas (R. 184) is reported in 219 S. W. (2d) 769 (advance sheets Tuesday, May 31, 1949, no. 4).

Jurisdiction

The judgment of the Supreme Court of Arkansas here sought to be reviewed was ordered to be entered in the case of *James Sheppard Potts, et al,* Appellants, v. *J. K. Rader, et al,* Appellees, therein pending and numerically designated as No. 8553, on the 18th day of April, A. D. 1949 (R. 183), and a petition for rehearing was denied by said Court on May 16, 1949 (R. 194). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925; United States Code Anotated, Section 344.

The Questions Presented, Statutes Involved, Specification of Errors and Statement of Case

A statement of the questions presented, the statutes involved, the specifications of error to be urged and statement of the case involved will be found in the foregoing petition.

ARGUMENT

For the convenience of the Court, we set out at this point the full West Publishing Co. headnotes in the case before the Supreme Court of Arkansas as they appear in 219 S. W. (2d) page 769.

1. Executors and Administrators—

Only beneficiaries of will could complain of executors' failure to carry out testator's instructions to sell planta-

tion and divide proceeds equally among testator's widow and children by conveying property directly to widow and children, and no complaint thereof could be made where testator's whole family had accepted executors' deed and recognized its validity for over 60 years.

2. Estoppel—

Defendants could not claim title to part of land in reliance upon executors' deed and at same time claim the rest upon theory of invalidity of the deed.

3. Partition—

The rule that a court of equity should not entertain partition suit when title to land is in dispute was not applicable where there was another clear ground of equitable jurisdiction.

4. Equity—

Where defendants in partition suit invoked aid of equity by joining in plaintiffs' request for appointment of a receiver, defendants could not thereafter question equitable jurisdiction.

5. Appeal and Error—

Where transcript of testimony on question of whether chancellor should have ordered division in kind instead of partition by sale was not filed in Supreme Court until long after time allowed by Supreme Court rule, motion to strike such testimony from record would be sustained, and without such testimony, Supreme Court would assume that evidence supported chancellor's action. Rules of the Supreme court, rule 5.

6. Army and Navy—

Application for a stay under Soldiers' and Sailors' Civil Relief Act is addressed to trial court's discretion.

Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U. S. C. A. Appendix, §§ 501 et seq., 521.

7. Army and Navy—

Refusal of motion of one of defendants in partition suit to stay proceedings under Soldiers' and Sailors' Civil Relief Act was not abuse of discretion, where there was no showing that such defendant's military service had impaired his ability to defend, and record justified conclusion that appeal to federal statute was made solely for purpose of delay. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 1 et seq., 201, 50 U. S. C. A. Appendix, §§ 501 et seq., 521.

QUESTIONS PRESENTED

While we consider that the several questions presented in the assignment of errors relied on, set out in our petition, are all important, the outstanding question so far as our appeal to this Court is concerned obviously rests upon the action of the Supreme Court of Arkansas in holding that the appellant, Adam Empie Potts, was not entitled to relief, on the record reviewed, under the Soldiers and Sailors Civil Relief Act. The opinion of the Court carries the consideration of this question as the final question to be considered (R. 185-186).

The action of the Court in each instance, in considering the rights of the petitioner under the Soldiers and Sailors Relief Act, bases such upon what was said by this Court in its majority opinion in the case of *Boone* v. *Lightner*, 319 U. S. 561. We are filing as an appendix or addendum to this brief a brief filed by counsel for the petitioner before the Supreme Court of Arkansas, which we hope the Court will consider, so far as applicable, as a part of this brief. But whether it be disposed

to do so or not, it seems to us that the question, last considered by the Supreme Court of Arkansas, stands at the very threshhold of all questions affecting the rights of your petitioners in this case. Clearly, if the state court erred in its holding in respect to the relief sought by this litigant, the case should be reviewed and reversed, and should be sent back to the lower court that complete relief may be granted to your petitioners without delay.

It is our position, for the reasons assigned in our petition, that, clearly, the Supreme Court of Arkansas erred in this major question, however reviewed; but the Court certainly erred in the narrow construction placed by it upon this important war relief act, in holding that the appeal to the federal statute so made by Colonel Potts was made for the purpose of delay, as was held in the *Boone* case, *supra.*

Concerning the second observation, it is submitted with confidence that there is no justification in the record in this case for the gratuitous insult made by the Court against this litigant. The assumption of such position by the learned Court, in the absence of the evidence to justify the language, found together with sundry mistakes of fact found in the opinion: such, for instance, where it states that a deed mentioned had been recognized as valid by the whole family for over sixty years, an assumption without foundation or support; or again, that "throughout this litigation both appellants have asserted an interest in the property under their mother's will", where the mother died intestate, (as shown by the record) and left no will; the position taken by the learned judge, that the appellants had invoked "the aid of equity by joining the plaintiff's request for the appointment of a receiver" that such thereby lost his right to question the jurisdiction of the Court (the record in this instance

showing that the appointment of a receiver in the early stages of litigation pertains to only the question of rents and profits, etc.); and the inaccurate statement found in the concluding paragraph of the opinion to the effect that the Supreme Court of Virginia had, in other litigation, held that the petitioners had been guilty of intentionally delaying such proceedings (171 Va. 52). It is submitted that such circumstances and expressions just related reflect a degree of carelessness on the part of the Supreme Court of Arkansas which should be considered by this Court when accepting or rejecting such findings in material matters.

From a realistic standpoint, on what possible ground could the petitioners herein have desired a delay in this cause at any stage, insofar as their inherent rights were concerned? They were concerned, and naturally and properly concerned, when an effort was being made on the part of contending litigants, for their own convenience, to hasten or retard litigation; or by such to hasten the sale of property, ancestral in its nature and long in the petitioner's family, at a time when, owing to war conditions, the orderly and deliberate progress of litigation could not proceed in a normal way; and particularly, when one of the litigants was actively engaged in military service, who as such was entitled to the protection afforded under the statute involved.

In respect to the second observation, namely, that the construction of the Court of the Soldiers and Sailors Relief Act was narrow, we maintain that the statute was applicable to any stage of any proceeding. The most important stage of the litigation in the instant case was that involved when the Court assumed to change its position in respect to partition, and to authorize a sale of the property. Such action on the part of the Court bringing

into the picture rights of other parties, which necessarily jeopardized or burdened the standing of such petitioners, who were then entitled to the provisions of this munificent statute.

In conclusion, it is submitted that it is desirable if not necessary, in the interest of the public as well as these litigants, that the case of *Boone* v. *Lightner* again should be brought under review by this Honorable Court. It is a remarkable circumstance that this case, which so often has been considered and construed by state courts, as we are advised, so far never has been reconsidered by this Honorable Court. The most recent reference being that found in the opinion of *Fontaine Lee Maistre* v. *Herman Leffers*, 33 U. S. 1-6, where the Court said, (reported in 92 L. Ed. 433):

> "But as we indicated on another occasion, the Act must be read with an eye friendly to those who drop their affairs for answer to their country's call. *Boone* v. *Lightner*, 319 U. S. 561-575. 87 L. Ed. 1587-1595, 63 S. Ct. 1223."

It is submitted with confidence that if the record in the instant case is so reviewed, your petitioner, Adam Empie Potts, was entitled to the protection afforded him by this statute but denied to him by the Supreme Court of Arkansas in the instant case. We submit that it would serve no good purpose for us to prolong this brief by reviewing the numerous cases referring to the Boone-Lightner case. Many of these have been collected and are found in Federal Code, Annotated, Volume 11, page 1130 and 1949 Supp. page 299.

It seems difficult to reconcile the decision of the Supreme Court of Arkansas in the instant case with its previous decision in *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S. W. (2nd) 678.

Ancestral Property in Arkansas

On the question of ancestral property in the state of Arkansas, we bring to the attention of the Court the following statute, namely Arkansas Statute 1947, Bobbs-Merrill 1948, Volume 5, Subject, Descents and Distribution, and the case of *Webb* v. *Cardwell*, 1939, 128 S. W. (2d) 691, 122 A. L. R. 814 and note.

Lapsed Legacies

In the case under consideration, Richardson, the Arkansas executor, and Grubbs, the Virginia executor, were directed to "*unite* and *concur*" in the sale of Sheppard Island and divide the proceeds among the wife and children or their descendants, in equal parts. Instead, Richardson, the Arkansas executor, on his own, quitclaimed the property to the heirs of the testator. This quitclaim is void and of no force and effect. The heirs so treated it and both executors died without selling the property; therefore, the legacy lapsed. A lapsed legacy is one which never has vested or taken effect; if an executor dies without exercising a power of appointment which is to be exercised by him alone, the legacy *lapses.* 57 Am. Jur. 955, Sec. 1424.

In *Fountain* v. *Ravenel*, 17 How. (U.S.) 369, 15 L. Ed. 80, it was held that where a will empowered the executors, or the survivor of them, to dispose of the residuary estate after the death of the testator's widow to such charitable institutions as they should deem best, the widow was named as one of the executors, and she survived the other executors and died without exercising the power, the residuary gift "lapsed" (Footnote 57 Am. Jur. 955).

Since the legacy had lapsed, due to the failure of Richardson and Grubbs, co-executors, "to unite and con-

cur" in a sale of the property and to divide the proceeds as directed in the will, and since the will does not contain a "residuary clause," the appellants respectfully submit that the intention of James Sheppard, the testator, is controlling. *Galloway* v. *Darby*, 105 Ark. 558, 151 S. W. 1014. 57 Am. Jur. 973, Sec. 1448. *Jackson* v. *Robinson*, 195 Ark. 431, 112 S. W. (2d) 417. *Witten* v. *Wegman*, 182 Ark. 62, 30 S. W. (2d) 834.

CONCLUSION

Accordingly, for the foregoing reasons, it is contended that the court below erred as herein specified and that its decision should be reviewed and reversed.

The will of James Sheppard shows his full intention that his property be *not given away* to strangers nor to be sold for strangers' benefit, and his own blood excluded.

This Appeal was taken from the Jefferson Chancery Court to the Supreme Court of Arkansas on February 25, 1948, by James Sheppard Potts and Adam Empie Potts, Appellants, against J. K. Rader, as administrator *de bonis non cum testamenta annexo* of Estate of A. E. Sheppard, deceased; Norman L. Flippen, as administrator *cum testamenta annexo* of Estate of A. B. Guigon, Jr., deceased; Lisa Guigon Shimberger and John Baird Shimberger; Sheltering Arms Hospital of Richmond, Virginia; Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women, of Richmond, Virginia; Joseph Schoolfield Potts, Jr., and Virginia N. Potts, Appellees.

All of these parties are residents of Richmond, Virginia, except Colonel Adam Empie Potts, whose residence is Hampton, Virginia.

Above-named appellants now are the Petitioners herein, and above-named appellees are the respondents; and

this petition is being filed after notice to all respondents and/or their counsel, and copies of this Petition, Brief and Appendix have been served and delivered to said opposing parties.

Respectfully submitted,

ALEXANDER H. SANDS,
Counsel for Petitioners.

APPENDIX

Supreme Court of Arkansas

JAMES SHEPPARD POTTS, ET AL., Appellants

v. No. 5555

J. E. RADER,
ADMINISTRATOR, ETC., ET AL., Appellees

APPEAL FROM
JEFFERSON COUNTY CHANCERY COURT
HARRY T. WOOLLDRIDGE, CHANCELLOR

SEPARATE BRIEF OF APPELLANT COLONEL ADAM EMPIE POTTS

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SUPREME COURT of ARKANSAS

JAMES SHEPPARD POTTS, ET AL ..... *Appellants*

V. No. 8553

J. K. RADER,
ADMINISTRATOR, ETC., ET AL .... *Appellees*

APPEAL FROM
JEFFERSON COUNTY CHANCERY COURT
HARRY T. WOOLDRIDGE, CHANCELLOR

SEPARATE BRIEF OF APPELLANT COLONEL ADAM EMPIE POTTS

STATEMENT

Colonel Adam Empie Potts, appellant, has been on active duty with the United States Army continuously while this suit has been pending in the trial court and still is on active duty with the Army of the United States.

This suit for partition was filed October 20, 1937, by plaintiffs who had no right to partition, as later determined by the trial court. Colonel Adam Empie Potts was named a defendant along with others. On November 17, 1937, he filed his separate answer and in his answer he stated that his two brothers and himself are the only natural and lawful heirs entitled to said property or any of it, as he and his brothers are the only surviving lineal descendants, next of kin and natural and lawful heirs of said James Sheppard, deceased, and are the only natural and lawful heirs of decedent Kate Empie Sheppard (widow of said James Sheppard, deceased), Mrs. Isabelle Sheppard Potts (their mother), Mrs. Annie Sheppard Lurty (widow without issue), Kate E. Sheppard Guigon (mother of A. B. Guigon, Jr., now deceased, bachelor without issue); and Adam Empie Sheppard (bachelor decedent without issue) and, as such, that this defendant and his two brothers now should be, and are the only ones entitled to have and to hold and to own said Sheppard Island property and are the only ones in whom any right, title or interest in said property now actually is vested; and, further, that all claims of any other interest (if there be any other interest) would be contingent upon the outcome of the various suits now pending against the estates of the herein mentioned decedents and all of said actions involving disputes as to

the title to the various real estate holdings claimed by said estates.

Colonel Potts set out further in his answer that title to said property is in dispute, denied the title of the appellees, denied the legal capacity of the appellees to sue, a defect of parties, and that the complaint did not state facts sufficient to constitute a cause of action and other things, and asked that a receiver be appointed to represent the property and collect the rents. A receiver was appointed and the case remained on the docket of the court and on May 19, 1939, a motion for continuance was filed on account of the illness of James Sheppard Potts, one of the defendants (T.56) and the motion was granted (T.60). Subsequently the court found it necessary to construe and interpret certain wills in order to determine title to the property as between certain parties.

The court did construe one alleged will which was appealed to the Supreme Court of the State of Arkansas. The decree of the trial court thereon is found at page 212 of the transcript, said decree being entered on April 6, 1940. The aggrieved parties appealed to the Arkansas Supreme Court and on February 27, 1941, the mandate was filed reversing the decree and the opinion is *Sheltering Arms Hospital of Richmond, Virginia* v. *Shinberger*, 201 Ark. 780, 146 S.W.

(2d) 921. The opinion was written by Justice McHaney. In that opinion he said:

> "We think it unnecessary to a full and complete understanding of the case to set out the various pleadings of the parties, further than to say the action was instituted by Rader, the Administrator and appellee against the three named charities and certain others who did not answer and have no interest in this controversy to have the will of A. E. Sheppard construed."

In other words, as stated by Justice McHaney, these appellants, James Sheppard Potts and Colonel Adam Empie Potts had no interest in the construction of the will of their Uncle A. E. Sheppard. During this appeal to the Supreme Court, proceedings in the trial court were in abeyance and the answer filed by Colonel Adam Empie Potts was awaiting trial. When the Supreme Court handed down its decision in 1941, the United States was then involved in a global war and Colonel Adam Empie Potts was on active duty. Nevertheless the trial court proceeded to take depositions in this case and when the depositions were taken in Richmond, Virginia, on the 17th day of April, 1942, it was suggested that Colonel Adam Empie Potts, appellant, was serving with the Armed Forces at Honolulu in Hawaii and was not able to be present; and it was pointed out in the deposition, at page 258 of the transcript, that permission had not been obtained

from the trial court to take depositions in the absence of Colonel Adam Empie Potts in the military service, and the rights of Adam Empie Potts were expressly reserved. Many motions, pleadings, amendments, etc., were filed in the case, all of which were filed by parties *other than* the appellant Colonel Adam Empie Potts. However, on September 7, 1943, appellant Colonel Adam Empie Potts applied for relief under the provisions of the Acts of Congress known as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. 501, 54 Stat. 1178, which was passed for the express purpose of relieving mental distress to soldiers and sailors occasioned by the handicap of their being in the military service. His motion to stay action is as follows:

> "1. That said defendant is now on active duty in the military service of the United States, serving as colonel in the United States Army, stationed at Camp Davis, North Carolina, as commanding officer of said camp.
>
> 2. That said defendant's military service demands his presence and attention to such extent that he has not had, does not have, and will not have during the period of said military service the time or ability to properly prepare his defense

in said case and to appear in court in defense of himself in said case.

3. That because of said defendant's military service, his records and documentary evidence are located at other points than his present station and that his military service prevents him from properly assimilating the same to be used in the preparation of his defense.

4. That said defendant's ability to properly defend himself in said case has been, is, and will be, for the duration of his military service, impaired by reason of his being in the military service of the United States as aforesaid.

Wherefore, said defendant moves the court to stay further action in said case, insofar as said defendant is concerned, for the duration of said defendant's service in the military service of the United States and for three months thereafter, as provided by the Soldiers' and Sailors' Civil Relief Act of 1940, and amendments thereto, as enacted by the Congress of the United States."

Apparently no immediate action was taken on this motion and the case lay on the docket.

However, many depositions and much proof was taken and, on May 24, 1947, a brother of appellant was informed by the attorney for the opposition that the court intended to enter a decree partitioning the property, and the brother replied that he was surprised that the Court would appear to disregard the protest made by Colonel Potts under the Soldiers' and Sailors' Relief Act (T.478). On September 2, 1947, without ruling upon Colonel Potts' motion for a stay under the Relief Act, the court decreed partition and appointed commissioners (T.457-473). The property was ordered sold—and the court still had failed to rule upon the motion of Colonel Potts for a stay. On October 3, 1947, Colonel Potts filed a motion to vacate decree and order of sale and to stay action (T.486-488), and in this motion he stated:

> "1. That said defendant is now on active duty in the military service of the United States serving as a Colonel in the United States Army and is stationed at Fort Winfield Scott in the State of California as Commanding Officer.
>
> 2. That said defendant's military service demands his presence and attention to such extent that he has not had, does not have and will not have during the period of said military service the time or

ability to properly prepare his defense in said cause or to appear in court in defense of his rights and interests involved in said cause.

3. That said defendant has been on active duty in the military service of the United States during the entire period of World War II, during much of which time he has been stationed overseas, and he will be on such active duty for a period of approximately one year from and after the filing of this motion.

4. That said defendant's records and documentary evidence are located at points far distant from his present station and at points other than the places where he has previously been stationed and that his military service has prevented and now prevents him from properly assembling the said records and evidence for use in the preparation of his defense herein.

5. That said defendant's ability to properly make defense in this cause has been, is and will be for the duration of his military service impaired by reason of his being in the military service of the United States, as aforesaid.

6. That at the time a decree was rendered in this cause on the 2nd day of

September, 1947, and at the time an order of sale was entered herein on the 9th day of September, 1947, this defendant was stationed at Fort Winfield Scott, as aforesaid, which is more than 2,000 miles from the place where this court is held and more than 3,000 miles from Richmond, Virginia, where said defendant's records and documentary evidence are located.

7. That the lands involved in this action known as the Sheppard Island Place are susceptible of partition among the persons entitled to said lands and should not be sold, but that this defendant will be prevented by his said military service from showing those facts to the court before the time fixed for said sale or during his said military service.

8. That if said lands are offered for sale during said defendant's said military service he will be prevented by such military service from attending the said sale and will be deprived of the opportunity to bid on said lands or to secure bidders who will bid for them their reasonable value.

Wherefore, said defendant moves that the court set aside and vacate its decree rendered in this cause on the 2nd day of September, 1947, and the order of sale

made by the court on the 9th day of September, 1947, directing the sale of said lands known as the Sheppard Island Place and stay further action in this cause, insofar as said defendant is concerned, for the duration of said defendant's service in the military service of the United States and for three months thereafter, as provided by the Soldiers' and Sailors' Civil Relief Act of 1940 and amendments thereto as enacted by the Congress of the United States."

A response, unverified, was filed to this latter motion stating and admitting that Colonel Potts had been in the army for ten years, and that during the war he was stationed in Virginia and North Carolina and that he could have defended the suit, that he had been represented by an able attorney and that his brother was a co-defendant, admitted that Colonel Potts was now stationed in California, but that his rights would not be prejudiced by this suit, his army service was no handicap, and that he could have obtained the records and defended if he had so desired (T.496-499). On October 24, 1947, Colonel Potts published a notice to intended bidders claiming his rights under the Relief Act (T.505). The court finally ruled upon his motion for stay on November 1, 1947, long after the court had

ordered the property partitioned and sold, and in its decree the Court said:

> "That the defendant Adam E. Potts is and has been at all times during the pendency of this action represented by counsel who has done everything necessary and proper in the defense of any and all rights of the said Adam E. Potts, and that the interests of the said Adam E. Potts would not be prejudiced in any way by permitting this action to proceed, and that the Soldiers' and Sailors' Relief Act is, therefore, in applicable to the facts of this case:"
>
> "That the exceptions to the report of the commissioners heretofore filed herein, be and the same are hereby overruled; that the motion of Colonel Adam E. Potts that this action be stayed under the Soldiers' and Sailors' Relief Act be and the same is hereby overruled; that the sale heretofore ordered be and the same is hereby vacated and set aside until the further orders of this Court."

In this same order, however, the court set aside its order of sale of the property, for the reason that one A. C. Creggett, adjoining land owner, had filed an affidavit in the office of the Circuit Clerk of Jefferson County claiming that the Creggett family were the owners of a part of the property sought to be partitioned. This order was filed November 13, 1947 (T.513). On December 6, 1947, David Knott, Charlie

Knott, and Roxie Lee Knott, his wife, intervened, and claimed that they owned a large part of the lands sought to be partitioned in this cause (T. 517); and on the same day the whole Creggett family intervened, setting up their claims to the property (T.521-523). Answers were filed to the interventions, a hearing apparently was held, and a decree on the interventions was entered January 13, 1948 (T.536). The decree was against the intervenors. On January 21, 1948, the court again ordered the property sold—sale to be held February 16, 1948—and ordered that the property not be sold for less than $46,500.00. The property allegedly was sold for exactly that figure. However, the money now is in the National Bank of Commerce at Pine Bluff, pending this appeal. The court did not approve the sale but, in effect, has asked the Supreme Court either to approve or reject the sale on appeal.

Appellant Colonel Adam Empie Potts submits that the trial court abused its discretion in refusing to give him a hearing upon his motions for stay, until after the decree of sale and the trial was complete; that it further abused its discretion in refusing to grant him a stay as provided in the Soldiers' and Sailors' Relief Acts, that he has been denied due process and equal protection of the law as guaranteed by the Constitution of the United States and of the State of Arkansas.

ARGUMENT AND BRIEF FOR APPELLANT COLONEL ADAM EMPIE POTTS

The Trial Court Erred in Refusing to Rule upon the Motion of Colonel Adam Empie Potts for a Stay of the Action

The record in this case shows upon its face that appellant, Colonel Adam Empie Potts, filed his separate answer in this law suit and defended it in good faith, made his appearances in court as long as his service in the Army of the United States would permit. The court will recall that the United States still was fighting for its very life in September of 1943, island hopping was just beginning in the Pacific and the invasion of Normandy was to begin several months later, in June of 1944; every available man was needed, the turning point of the war was just ahead, and preparation for the invasion of Normandy was a stupendous task; fighting on two fronts was straining our manpower in the Armed Forces and every available man was needed. At that time, Colonel Adam Empie Potts was Commanding Officer of one of our large army training posts, a very important post and a very responsible position indeed to the whole Nation. This law suit, in which the Colonel was one defendant, had been pending in Jefferson County

since October, 1937, and under these war conditions, he moved for a stay under the Soldiers' and Sailors' Relief Act of 1940, and properly filed his motion on September 7, 1943. This stay should have been granted for the duration of the war and three months, as Justice Holt, in *Reynolds* v. *Haulcroft*, 205 Ark. 760, 170 S.W. (2d) 678, on May 3, 1943, under war time conditions, and just three months before the Colonel filed his motion, said:

> "The purpose of such enactments is to relieve a person so engaged in military service from the mental distress occasioned by the handicap of his being in the military service, resulting in his inability to function with the freedom of action which he possessed prior to his induction into the military establishment, causing inability to meet financial and other obligations and commitments, the mental distress resulting from inability to adequately protect legal rights and interests or to make proper defense to suit brought against him, it being recognized that such distress has the tendency to impair his efficiency as a member of the militia, and, as well, the tendency to impair the efficiency of the organization with which he may be associated; the design was to 'prevent interference with military duties.' *Andrews* v. *Gardiner*, *supra* (185 App. Div. 477, 173 N.Y.S. 1).
>
> Section 521 deals with conditions under which a stay of proceedings will be

> allowed, and provides: 'At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. Oct. 17, 1940, c 888, S. 201, 54 Stat. 1181.'
>
> In the instant case, appellant, Reynolds, has asked for a stay, and in so doing, in our opinion, has taken away from the trial court any discretion that it might have had, on its own motion, and in the absence of request for a stay by the sailor, and has made the allowance of a stay mandatory 'unless in the opinion of the court the ability.....of the defendant to conduct his defense is not materially affected by reason of his military service'."

The court further said that, upon application by the soldier, the stay was mandatory, unless, in the opinion of the court, the ability of the defendant to conduct his defense is not materially affected by reason of his military service. It held also that the burden is on the party resisting

the stay to prove by clear and convincing evidence that the rights of the soldier would not be impaired.

Chief Justice Smith concurred and agreed that the Act should be liberally construed, agreed with the result, but disagreed with language used because the "trial court is now without discretion".

Under this decision, without a doubt, appellant's application for a stay should have been granted. However, no action was taken upon the application for stay, as the transcript of the record will show. The court completely ignored the motion for a stay, took no action thereon, and proceeded as if it never had been filed.

On June 30, 1944, about the time of the Normandy invasion, the court ordered Chris L. Wright to make a survey of the property, to aid the court in determining whether or not partition could be made (T.388). The report is shown at pages 412-440 of the transcript and is detailed and lengthy, reflects long study, hard work and deliberation. The court ordered the receiver to pay Chris L. Wright the sum of $2,000.00 for his services (T.441).

In an order dated June 17, 1943, the court held: "that the lands are susceptible of partition,

having regard both to quality and quantity...." (T.381).

Mr. Wright reported that the property was subject to partition in kind and, at page 423 of the transcript, he said:

> "In the recommended partition set out below all of the three parcels are contiguous; and are further susceptible of partition in kind if this is desired at some later date by the owners."

Mr. Wright's report was filed July 13, 1946. However, the court entered its decree on September 2, 1947, decreeing partition and appointed commissioners (T.457-473). The record does not reflect that the commissioners ever took an oath. However, exactly one week from the date of their appointment, September 9, 1947, they filed their report stating that partition could not be made without great prejudice to the owners, and without giving any reasons (T.474). On the same day, September 9, 1947, the court approved the report of the commissioners—without giving these appellants time to see the report and object and offer testimony, and without regard to the application for a stay which had been filed by Colonel Potts, who was over two thousand miles away, serving his country in time of war. The court ordered the property sold on October 6, 1947 (T.476).

We contend that this action of the court is a clear abuse of discretion. Colonel Potts was two thousand miles distant, a report had been on file by a competent engineer for over a year-and-a-half to the effect that his property could be divided in kind and his part set off to him, said report costing the sum of $2,000.00, and the court had previously found that the lands were susceptible of partition, having regard both to quality and quantity. Without any notice to him, the court appointed commissioners, determined that the property could not be partitioned in kind, and ordered it sold—all of which was done within one week, without giving reasons and without giving either the plaintiffs or the defendants an opportunity to object to the report of the commissioners; and all of said action of the court was taken in complete disregard of the motion for stay filed by Colonel Potts in September of 1943, and without taking action thereon.

The appellant, Colonel Potts, learned of the action of the court, and filed a motion to vacate the decree of sale and to stay action, on October 3, 1947 (T.486). He stated that he was stationed in California as a Commanding Officer, that his ability to defend his law suit was impaired by reason of his military service, that the lands involved in the action were susceptible of division and should not be sold, but that he was prevented

by reason of his military service from showing those facts and that, if a sale were had, military service would prevent him from making an adequate bid (T.486). Under these circumstances, it was a clear abuse of discretion for the court to conduct hearings for three years, without ruling upon the application for stay which had been filed by Colonel Potts. His application for stay had been filed in 1943, and, according to the doctrine in *Reynolds* v. *Haulcroft, supra*, it was the burden of the parties resisting the stay to prove by clear and convincing evidence that the rights of the soldier would not be impaired. No party to this action had resisted Colonel Potts' application for a stay, no proof had been introduced by anybody, except by Colonel Potts' brother, and all of this testimony was to the effect that Colonel Potts could not adequately defend. Even though this application was in the files of the case and this testimony was on file with the court, still the court let it lie in the file for three years and never had said yes or no to the application for stay, but proceeded as if said application were non-existent—and had reached the point, after varied, ramified, and lengthy litigation involving boundary disputes, title disputes, and construction of wills, where it decreed the sale of the property and fixed a date for the sale. Colonel Potts then renewed his application for a stay, and moved to vacate the decree of sale, by reason of his inability to defend or to bid at the

sale and thereby to protect his rights by reason of his military service (T.486). On October 9, 1947, more than three years after Colonel Potts had filed his application for a stay, the first response to his application for a stay was filed, and this was to his renewed application that was made after the sale was ordered (T.496). What a unique response it was! It admitted that Colonel Potts had been in the army for over ten years, that he didn't expect to end his military service soon (as if it were a matter of his own volition), that he had a brother who was a defendant; that they had the same able attorney (this is not verified by the record—the record shows that the Colonel filed his own application for a stay and prepared his own answer), that the undisputed proof showed that there was no defense to be made by Colonel Potts, that Colonel Potts had ten years in which to defend and hadn't done it (we are not so sure the army would have given him a three-year leave during time of war to litigate this suit in Jefferson County, since he was Commanding Officer of a large training camp), that any proof he could offer would be merely cumulative of what already had been offered. Who, of all people, resisted the stay? The answer is: the Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women and the Sheltering Arms Hospital! The court did, however, on November 1,

1947, over-rule the Colonel's application for a stay. The court ruled:

> "That the defendant Adam E. Potts is and has been at all times during the pendency of this action represented by counsel who has done everything necessary and proper in the defense of any and all rights of the said Adam E. Potts, and that the interests of the said Adam E. Potts would not be prejudiced in any way by permitting this action to proceed, and that the Soldiers' and Sailors' Relief Act is, therefore, in applicable to the facts of this case;
>
> That partition of the property involved in this action cannot be made without great prejudice to the owners, as set up in the report of the commissioners herein, and that the Court should and does hereby approve the report of the commissioners herein and finds the facts therein set forth to be true;
>
> That the exceptions to the report of the commissioners heretofore filed herein, be and the same are hereby overruled; that the motion of Colonel Adam E. Potts that *this* action be stayed under the Soldiers' and Sailors' Relief Act be and the same is hereby overruled; that the sale heretofore ordered be and the same is hereby vacated and set aside until the further orders of this Court."

Counsel for Colonel Adam E. Potts had authority only to plead for Colonel Potts the bene-

fit of the Soldiers' and Sailors' Civil Relief Act. Counsel had no other authority.

At the time of this order, all of the proceedings were over as far as the partition was concerned, except the sale; the court had held a three-year trial. If the stay had been granted to Colonel Potts, the proceedings during the last three years would have been a nullity and time wasted, the trial court placed itself in a position where it had to over-rule the application for stay or cast aside three years of costly litigation. Even so, the court should have protected Colonel Potts. Appellant is not unaware of the decision in *Glick* v. *Wade*, 206 Ark. 8, 172 S.W. (2d) 929, by Chief Justice Smith, in which he modifies the holding in the Haulcroft case. We note also the concurring opinion by Justice McFaddin, in which he concurs in the result but by different reasoning, and states that, in his opinion, the rights of the serviceman are protected, because he can proceed under the Act after his service ends. To the same effect, see *Martin* v. *Rolfe*, 207 Ark. 1072, 184 S.W. (2d) 70. But under the decision in either case, the trial court clearly abused its discretion.

In *Boone* v. *Lightner*, 319 U.S. 561, 63 S. Ct. 1223, (quoting from the syllabus) it is said:

> "In determining right to stay proceeding against defendant in military ser-

> vice, absence when one's rights or liabilities are being adjudged is usually *prima facie prejudicial*, but absence may be a policy, instead of the result of military service, and discretion is vested in courts to see that immunities of the Soldiers' and Sailors' Civil Relief Act are not put to such unworthy use."

In the Boone case, the defendant was a "trustee-lawyer" holding $15,000.00 in trust and had refused to account for the money, when called upon to do so, he filed an affidavit of military service stating that "he expected soon to be called to service and would be unable to try the case and asked a continuance in order to give defendant ample time to employ other counsel". The trial court found that defendant "is not upon the motion for continuance acting in good faith". It found further "It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done". The United States Supreme Court in reviewing the case said:

> "The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion."

The court leaned heavily upon the fact that defendant was a "lawyer-trustee", was guilty of

wrong-doing, that he appeared in court on the matter with counsel and plead military service even before he was called to duty, when "he expected" to be called, he asked for a continuance upon the ground that "counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel". Under these circumstances, the United States Supreme Court held that the trial court did not abuse its discretion, but stated:

> "The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. *Defendant in spite of military service in Washington was continuing to administer the fund*" (italics ours).

In other words the "lawyer-trustee's" military service did not interfere with his administration of a $15,000.00 fund, but his military service did "interfere" when he was called upon to account. Under these circumstances, the trial court properly exercised its discretion in refusing to grant a stay of the action. Even so, Justice Black dissented and said:

> "The Court emphasizes that Boone is a member of the bar. But for the duration of the war, he is primarily a soldier with a job to do which Congress intended should over-shadow personal interests,

whether his, or those of others who seek a personal judgment against him. It is difficult for me to believe that he could adequately have prepared for this trial without a leave of many weeks. The purpose of the Act is to prevent soldiers and sailors from being harrassed by civil litigation 'in order to enable such persons to devote their entire energy to the defense needs of the nation'. He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.

The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case. In the course of the war, numerous actions will be brought against soldiers who have never heard of this Act and have no notion that this Court might want them to apply to their superior officers for leave and to make and file a formal record of their superior officers' refusal."

The decision in *Lankford* v. *Milhollin*, 28 S.E. (2d) 752 (Ga.) 1944, involved the matter of a stay under the Soldiers' and Sailors' Relief Act in a *partition* suit. It was said in that case (quoting from the syllabus):

> "Under Soldiers 'and Sailors' Civil Relief Act, person is entitled to stay of proceeding by or against him upon his bare application showing that he is in military service, unless it appears that his ability to prosecute or defend is not materially impaired.—S. & S. Civ. Relief Act of 1940, Sections 100, 201, 50 U.S.C.A. Appendix, Sections 510, 521.
>
> Under Soldiers' and Sailors' Civil Relief Act, Court must exercise discretion as to whether there is material impairment of ability to prosecute or defend, but Court's conclusion can not rest upon conjecture.
>
> Refusal to grant continuance as to two of plaintiffs, who were in the Army, of cross-action seeking partition of land by sale was error where evidence did not show that their ability to defend such cross-action would not be materially impaired by reason of their military service.
>
> In determining right to continuance of cross-action for partition of land by sale because of absence in military service of two of plaintiffs, *their financial ability, and possibility that if present they could*

arrange for loan so as to become bidders at sale, could be considered (italics ours).

On motion for continuance of cross-action seeking partition of land by sale, because of absence in the Army of two of plaintiffs, testimony as to possibility of partition in kind by agreement if such parties were present was improperly excluded."

Governed by the rule in these cases, it is apparent that the trial court abused its discretion in refusing to grant Colonel Potts a stay of the action. No party to this litigation contends that the Colonel was not acting in "Good faith" when he filed his affidavits of military service, no party contends or can contend in good faith that the Colonel was seeking only to use the Soldiers' and Sailors' Relief Act to cover up "wrong-doing", on his part, or a breach of trust. He claims that he and his two brothers own the Sheppard Island Plantation, that he owns an undivided one-third interest, and not a mere one-ninth interest as contended by appellees, that he has documentary and record evidence located at points far distant from his present station and places where he was previously stationed, to prove his claim; and, furthermore, he readily agreed to the appointment of a receiver for the property, agreed that it be rented and the funds impounded pending the day when he could return and prove his case.

In the *Lankford* v. *Milhollin* case, the Court held that these service men were entitled to a continuance, even though they did have representation by an attorney, and even though one of them was stationed nearby and had appeared personally in court several times during the trial of the case. Their attorney testified:

> "....it would be sold for whatever you—desire to pay for it; and those boys in the military service, as I see it, would be deprived of their property without even bidding on it or helping finance it, and come back and find their place sold and gone for much less than its worth. It certainly is unfair to try to partition in their absence."

Under these circumstances, appellant Colonel Adam Empie Potts respectfully submits that the trial court clearly abused its discretion.

The Trial Court Denied Colonel Adam Empie Potts Due Process of Law and Equal Protection of the Law as Guaranteed by the Fourteenth Amendment to the Constitution of the United States

It is admitted by all parties that the property in Jefferson County, Arkansas, known as Sheppard Island Plantation, the subject of this

suit, was owned by James Sheppard, Grandfather of the appellants in this cause. It is admitted also that James Sheppard Potts, Joseph Schoolfield Potts, Jr., and Colonel Adam Empie Potts are the grandchildren of said James Sheppard and that these three Potts Brothers are the only surviving descendants and are the sole heirs at law of said James Sheppard, deceased.

The will of James Sheppard, a resident of Jefferson County, Arkansas, was admitted to record in Jefferson County Court, at Pine Bluff, Arkansas, on August 8, 1870, recorded in Will Book 1, at page 274 (T.91). By said will, he provided for disposition of his Arkansas property, Sheppard Island Place, as follows:

> "My will and desire is that all my land and other property in the State of Arkansas be sold by my executors hereinafter named as soon after my death as they deem to the interest of my estate, and that the proceeds of sale be equally divided among my wife and children, my wife taking an equal share with each of my children so that her share shall be equal to the share of one of the children."

Two executors were named, Benj. F. Richardson for Arkansas property, and Peter W. Grubbs, of Richmond, Virginia, for Virginia properties; and the will further provided that:

"My two executors are to unite and concur in the sale of my property in the State of Arkansas."

The record shows upon its face that said executors did not concur and unite in a sale as directed in the will, the record does show that they made no attempt to comply with the terms of the will, it shows upon its face that one executor, Benj. F. Richardson, made an attempt to quitclaim his interest to the heirs of the testator and "doth hereby turn over the possession and control of the above described real property (which was not described) situated in Arkansas, belonging to the Estate of the late James Shepherd, dec'd unto the said Annie E. Shepherd, A. Empy Shepherd, Belle G. Shepherd, Katie E. Shepherd, Jr., and Katie E. Shepherd, Sr., who are the devisees and heirs of the late James Shepherd, dec'd." (T.138, 139).

Appellant Colonel Adam Empie Potts, set up in his answer to the partition suit that he and his two brothers are the owners of the Arkansas properties, and he reasons that the co-executors of his grandfather's will never executed the trust which directed them to "unite and concur" in the sale of the Arkansas property and to divide the proceeds, that this trust was personal to them and that their death terminated the trust and, therefore, the legacy lapsed; that the instrument

Richardson executed is void, thereby vesting a life estate only in Annie E. Sheppard, A. Empie Sheppard, Belle G. Sheppard, Katie E. Sheppard, Jr., and Katie E. Sheppard, Sr. That these life tenants are dead, and since appellant and his two brothers are the only three living lineal descendants and heirs of their grandfather, James Sheppard, that they now own the Arkansas properties. Appellant Colonel Adam Empie Potts contends that he has writings and records in his possession and in storage to prove that his contentions are correct, that the heirs had an agreement as to the operation and division of proceeds of the Arkansas properties, that he would produce said writings and records and prove that he and his two brothers own the Arkansas properties, but that his military service prevents and has prevented him from so doing, that the writings and records necessary to prove his case are inaccessible to his two brothers not in the military service, that it is not possible for his two brothers adequately to prove *his case* or *their case*, due to his active service in the United States Army.

Colonel Potts attempted to preserve his rights under the Soldiers' and Sailors' Relief Acts of 1940 at every stage of the proceeding as far as his military service would permit.

The first suggestion of military service of Colonel Potts was made by his brother, James Sheppard Potts, in a deposition taken at Richmond, Virginia, on April 17, 1942 (T.256 ffl.), Said testimony is as follows:

"A. Adam Empie Potts and Joseph Schoolfield Potts, Jr., are my two brothers and equally interested in any benefits to be received from the estate of our grandfather, James Sheppard. May I state at this time—it may be necessary to put it in the deposition—that Adam Empie Potts is now a Colonel or Brigadier General, serving with the armed forces at Honolulu in Hawaii and is not able to be present, although he has filed an answer in this case.

MR. FLIPPEN:

I would like to request if any consent of court has been obtained for proceeding in the absence of Adam Empie Potts in military service.

THE WITNESS:

Not that I know of; nothing that I know of to that effect.

MR. STONE:

Mr. Flippen has just anticipated me.

THE WITNESS:

In fact, I know they haven't gotten any consent.

MR. FLIPPEN:

I would like the record to show that we are not waiving any objection we have to the proceeding here today and to the filing of the depositions or any part thereof.

MR. STONE:

Does Mr. Wickham desire to make any statement in the record?

MR. WICKHAM:

I, of course, reserve any right we may have.

MR. STONE:

Counsel for James Sheppard Potts desires to state to the Court that the evidence is that Adam Empie Potts, who is a party to this suit and who has filed an answer, which answer in-

dicates on the face thereof that he is also a necessary witness to enable the Court to determine the merits of this cause, is in the armed service of the United States Government. The records of the Court in this cause apparently do not show that there either has been a peremptory order by the Court or any consent by Adam Empie Potts dispensing with any provisions of what is colloquially known as the Soldiers' and Sailors' Act and the stay of proceedings thereunder. For this reason counsel desires to state to the Court that he is proceeding with the deposition taken this day subject to any ruling of the Court as to the propriety of taking depositions under said circumstances and the legal effect thereof.

Q. Mr. Potts, to your own knowledge is there in the possession of Adam Empie Potts any evidence, documentary or otherwise, that would be pertinent to these proceedings and helpful to the court in the determination of this cause?

A. I believe and am positive that there is considerable information and consid-

> erable data and other records in his possession which he would like to bring before the Court and which are very necessary to protect his interest in this cause."

Colonel Potts was not represented by counsel in the case, as shown by the testimony (T. 272).

The deposition of Louis S. Herrink was taken on behalf of the plaintiffs at Richmond, Virginia, on the 9th day of October, 1942, and appellant Colonel Adam Empie Potts objected as follows:

> "James Sheppard Potts, Counsel for Adam Empie Potts, objects to the taking of these depositions and to any proceedings being held in this matter in Jefferson Chancery Court, State of Arkansas, due to the fact that said Adam Empie Potts, is now a Colonel, or Brigadier General, in the armed forces of the United States of America, and is assigned to active duty and unable to protect his interest and is unwilling that these proceedings be carried on further and objects to same until after the duration of the present war and military emergency in conformity with the Soldier's and Sailor's Re-

lief Act of 1940, passed by the Congress of the United States."

On June 11, 1947, J. S. Potts, Jr., addressed a letter to A. F. Triplett, which reads in part as follows:

"Dear Mr. Triplett:

SUBJECT: *Sheppard Island Plantation*

I wish to thank you for your letter of May 24th, indicating an intention on the part of the Chancery Court to enter a decree for partition of the above property, and I am surprised that the Court would appear to disregard protest made by Colonel A. E. Potts under the Federal Soldiers' and Sailors' Civil Relief Act, which is controlling at this time. Further, I wish to be on record as concurring with Colonel Potts, as he is entitled to an opportunity to handle his own affairs, which, of course, is the reason for the above Civil Relief Act."

Appellant, Colonel Adam Empie Potts, in October, 1947, caused to be published in the newspapers of Jefferson County and in public places the following notice:

"NOTICE"

"To all bidders or intended purchasers of the lands known as SHEPPARD ISLAND PLANTATION, located in Jefferson County, Arkansas, and advertised for sale by auction at the Court House, Pine Bluff, Arkansas, under decree of the Chancery Court of Jefferson County, Arkansas, in the case of *J. K. Rader, Administrator* v. *James Sheppard Potts, et al,* TAKE NOTICE:

That, Colonel Adam E. Potts, Coast Artillery Corps, United States Army, a joint owner of SHEPPARD ISLAND PLANTATION, is on active military service with the Armed Forces of the United States and unable to be present to protect his rights at this sale:

That he claims his interests are materially affected by the terms of the aforesaid decree ordering this sale, and:

That as a result of which he invokes his right of protection under Section 200 (4), Article II of Public Law No. 861, 76th Congress, 1940—(Soldiers' and Sailors' Civil Relief Act), reserving unto himself the right to reopen this case within 90 days after termination of his active military service; and therefore, that pursuant to the above, the title to this property

which might be conveyed under said sale is impaired and no bidder can be a bona fide purchaser for value under said decree."

On October 17, 1947, after a sale had been ordered, testimony was taken upon exceptions to the order of sale and James Sheppard Potts testified that Colonel Adam Empie Potts was in the Coast Artillery at that time, stationed at Ft. Winfield Scott, California, that he was in the Army of the United States in 1937, when this action was filed, that he had been on continuous active duty since that time, a large part of the time in foreign service in Honolulu, Hawaii, remained overseas in Honolulu until 1943, where he was commanding officer of an Anti-aircraft unit at Schofield Barracks, he was there at the time of Jap raid on December 7, 1941, fired the first shot at the Japs and is credited with shooting down the first Jap plane of the war. He testified further that Colonel Adam Empie Potts has records in storage, inaccessible to him, necessary to their defense of this case (S.T.9-20).

Joseph Schoolfield Potts testified and verified and corroborated the testimony of James Sheppard Potts, that he had been in the military service himself and knew that Colonel Potts had been kept very busy attending to his military duties, that he personally knew that Colonel Potts

could not look after his interests in Arkansas, due to his military service (S.T.21-25).

The above and foregoing is all of the pleadings and testimony in the record in regard to the military service of Colonel Potts and the testimony of witnesses to the effect that he could not and cannot adequately present his defense and protect his rights, due to his active service in the United States Army. Colonel Potts' own affidavit of military service properly verified that his rights in this law suit are being prejudiced, due to his military service, is undisputed.

The refusal of the trial court to grant a stay under these circumstances is tantamount to a refusal to permit Colonel Potts to defend his title to said property and is a denial of due process and equal protection of the law.

Attorneys for Appellant have not attempted to point out defenses of Colonel Potts to the partition suit in detail, nor to point to errors of the trial court in ordering a sale of the property, nor to errors in procedure, for the reason that Colonel Potts firmly believes that the Soldiers' and Sailors' Relief Act should adequately protect him during his military service and that his right to defend will be reserved to him until he can be present; therefore, attorneys for appellant have confined this brief to a statement of his rights

under the Soldiers' and Sailors' Relief Act, in accordance with his instructions.

Further, we have cited only the testimony and parts of the pleadings in this brief pertaining to the matter of "stay", on the Soldiers' and Sailors' Relief Act. A complete abstract of the pleadings and testimony is fully abstracted in the brief filed by Appellant James Sheppard Potts and is hereby adopted by reference as though set out fully herein. To abstract the record fully herein would be merely repetition and would serve no useful purpose.

CONCLUSION

Appellant submits that the trial court clearly abused its discretion in refusing to rule upon his motion for stay before ordering a sale of the property and in refusing to grant a stay, that the receiver could have continued to collect and account for all rents upon the property in controversy without prejudice to any of the parties during his military service, that this large plantation consisting mainly of farming and timber land can be partitioned in kind into either thirds or ninths as the interest of the parties may appear after trial upon the merits, that appellant should have been given an opportunity to bid at the sale (if or when a sale had become neces-

sary), that appellant filed his "Motion for Stay" by reason of military service in good faith and not for purposes of delay, that his motion should have been granted, that the trial court's refusal to grant a stay is a denial of due process and equal protection of the law as guaranteed to him by the Constitution of the State of Arkansas and by the Fourteenth Amendment of the Constitution of the United States of America.

Wherefore, appellant, Colonel Adam Empie Potts, prays that this cause be reversed and remanded with directions to set aside the "Order of Sale", to strike all proceedings subsequent to his answer, and that he be permitted personally to present his defense, and to have his day in court, for costs and all proper relief.

W. H. GLOVER

CARL LANGSTON

JAMES SHEPPARD POTTS

Attorneys for Appellant

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

Number 260

JAMES SHEPPARD POTTS AND
ADAM EMPIE POTTS . . . . . *Petitioners*

v.

J. K. RADER, as Administrator, etc.,
ET AL . . . . . *Respondents*

SEPARATE ANSWER OF JOSEPH SCHOOLFIELD POTTS, JR., CONCERNING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS IN THE ABOVE ENTITLED CAUSE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

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JOSEPH SCHOOLFIELD POTTS, JR.,
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CERTIORARI TO THE SUPREME COURT OF
ARKANSAS IN THE ABOVE ENTITLED
CAUSE

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The undersigned, Joseph Schoolfield Potts, Jr., is a brother of the above-named petitioners, James Sheppard Potts and Adam Empie Potts, and as such is jointly and equally interested with them in the property known as Sheppard Island Plantation, in Jefferson County, Arkansas, which property is the subject of this suit. The undersigned, who is not represented by counsel, occupies the position (technically) as a respondent, and now comes to file herein this his answer, wherein he hereby adopts the petition and asks the consideration of the brief heretofore filed in this Court by his brothers, the petitioners.

Respectfully,

JOSEPH SCHOOLFIELD POTTS, JR.

September 8, 1949

FILE COPY
No. 260

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

JAMES SHEPPARD POTTS AND ADAM EMPIE POTTS

Petitioners

v.

J. K. RADER, AS ADMINISTRATOR, ET AL,

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF SAID RESPONSE

ARCHIBALD G. ROBERTSON
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Counsel for Lisa Guigon Shinberger, Sheltering Arms Hospital, Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women.

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The Respondents, Lisa Guigon Shinberger and three charitable organizations of Richmond, Virginia, namely, Sheltering Arms Hospital, Virginia Home for Incurables, and Protestant Episcopal Church Home for Old Women, respectfully present to the Court this their response to the petition for writ of certiorari herein.

QUESTIONS PRESENTED

Three questions are presented in the petition for writ of certiorari, (1) the alleged abuse of the trial court's discretion in denying Colonel Adam Empie Potts' protection to which he alleges he was entitled under the Soldiers and Sailors Civil Relief Act, 1940; (2) the refusal of the trial

court to recognize certain alleged canons of real estate law prevailing in the State of Arkansas with reference to the devolution of ancestral estates; and, (3) the alleged denial of due process and the equal protection of the law guaranteed to the Petitioner under the Constitution of the United States of America. While the petition asserts three alleged errors, actually only two points are presented and this is recognized in the brief in support of the petition since it is confined to two points; namely, (a) the alleged abuse of discretion of the trial court in refusing Colonel Adam Empie Potts a continuance of the entire proceeding because of his military service; and (b) the question relating to the devolution of ancestral estates in Arkansas.

STATEMENT OF THE CASE

This litigation arose with reference to the Estate of Adam Empie Sheppard who died near Richmond, Virginia in Henrico County on the 29th day of November, 1934, and whose estate is yet unsettled because of various litigation. Litigation was first instituted in the Commonwealth of Virginia by an attack on the will of Adam Empie Sheppard by James Sheppard Potts, Adam Empie Potts and Joseph Schoolfield Potts, three of the nephews of the decedent, Adam Empie Sheppard. In that suit it was also alleged that Adam Empie Sheppard deceased, was largely indebted to the Potts brothers because of Sheppard's alleged mismanagement of several other estates of relatives of the Potts brothers. All of these estates had been handled by Adam Empie Sheppard over a period of more than thirty years before his death. No litigation had been instituted against Adam Empie Sheppard during his lifetime with respect of said estates. That suit was decided adversely to the Potts brothers and was appealed by them

to the Supreme Court of Appeals in Virginia. The Supreme Court of Appeals of Virginia (*Potts* v. *Flippen* 171 Va., 152) affirmed the trial court. Application for a writ of certiorari then was made to the Supreme Court of the United States but certiorari was denied (see *Potts* v. *Flippen* 305 U. S. 662, 59 S. Ct. 364, 83 Law Ed. 429). A rehearing before the Supreme Court of the United States was likewise denied (see 306 U. S. 664, 59 S. Ct. 487, 83 Law Ed. 1062),

The Arkansas litigation with reference to the estate of Adam Empie Sheppard was instituted in October of 1937, and was actively litigated from that time until after the beginning of World War II. It was not until a year and a half after the beginning of the war that Colonel Adam Empie Potts moved the Arkansas Court to stay the action under the Soldiers and Sailors Civil Relief Act of 1940. Theretofore a large part of the evidence had already been taken. At all stages of the controversy both prior to and subsequent to Pearl Harbor, Colonel Adam Empie Potts has been represented by able counsel. In the meantime, one branch of this suit was decided by the trial court and was appealed to the Supreme Court of Arkansas (*Sheltering Arms Hospital* v. *Shinberger,* 201 Ark. 780, 146 S. W. 2d, 921). The trial court as to the motion of Colonel Potts found that he "is and has been at all times during the pendency of the action represented by counsel who has done everything necessary and proper in the defense of any and all right of the said Adam Empie Potts, and that the interest of the said Adam Empie Potts would not be prejudiced in any way by permitting this action to proceed and that the Soldiers and Sailors Relief Act is therefore inapplicable to the facts of this case." This decision was appealed to the Supreme Court of Arkansas and was decided adversely to the Potts brothers (*James Sheppard Potts and Adam Empie Potts* v. *J. K.*

Rader, Administrator, et al, 219 S. W. 2d, 769 (advance sheet No. 4, May 4, 1949). A writ of certiorari is here being sought with reference to this last mentioned case. Thus, approximately fifteen (15) years after the death of Adam Empie Sheppard, his estate is still unsettled and approximately four (4) years subsequent to the termination of hostilities in World War II, Colonel Potts is still trying to obtain an extension of time.

We do not believe it will serve any useful purpose to reiterate the entire background of this litigation since it is fully set forth in the Motion to Dismiss under Rule Five of the Arkansas Supreme Court. This motion to which we respectfully refer the court is set out in full on pages 169 to 182 of the supplement to the record in this case.

BRIEF IN SUPPORT OF RESPONSE

We will discuss only the two points which are discussed in the brief of petitioners in support of petition for writ of certiorari.

(a) Soldiers and Sailors Civil Relief Act.

We respectfully refer this Honorable Court to the opinion of the Supreme Court of the State of Arkansas, set forth in full on pages 184, 187 of the record in this case. In that opinion the Supreme Court of Arkansas points out that Colonel Potts had been in the regular army for many years prior to the World War II and prior to the filing of this suit. By his own admission, Colonel Potts relied completely upon his brother, James Sheppard Potts to attend to all matters pertaining to the Arkansas property. The brother, James Sheppard Potts, is an eminent and able lawyer. In 1939, Colonel Potts joined in a verified motion for a continuance of the Arkansas case upon the ground

that his brother, James Sheppard Potts alone, was informed as to the details of this case and that James Sheppard Potts was then too ill to appear as a witness. In that motion, Colonel Potts' lack of familiarity with the details of this case was stressed. It is difficult to see, if the affidavit is true, how Colonel Potts would have been of any value in the defense of the suit. It is recited in the opinion of the Supreme Court of Arkansas that there was no showing of any kind to indicate that the military service of Colonel Potts in any manner impaired his ability to defend the suit. We respectfully submit that there is not yet any showing of any kind which might indicate that Colonel Potts was in any manner hampered in the defense of the suit by his military service. He was represented by able counsel (his brother and other counsel in Arkansas) throughout every stage of the controversy.

In *Boone* v. *Lightner,* 319 U. S. 561, this Honorable Court held that the mere fact of a litigant being engaged in military service was not sufficient to require the trial court to continue litigation in which such soldier might be involved.

> "It seems now to be universally held that this section does not grant a person in military service immunity from the trial of actions against him unless in the Court's opinion the defendant's ability to conduct his defense is materially and adversely affected by his military service. Among the cases so holding is *Glick Cleaning and Laundry Co.* v. *Wade,* 206 Ark. 8, 172 SW 2d 929.
>
> "The act may not be invoked to delay or defeat the orderly or expeditious trial of valid suits. *Brown Service Insurance Co.* v. *King,* 247 Ala. 311, 24 So. 2d 219. *Ridley* v. *Young,* 64 Cal. App. 2d 503, 149 P. 2d 76.
>
> "In determining whether one in the military service

is entitled to a stay of proceedings, the nature of the action and the applicant's relation to it, his knowledge of the matters involved as affecting the necessity of his presence at the trial for adequate protection of his rights, his lack of diligence in protecting his rights, or failure to obtain leave to be present at the trial, when such leave might have been obtained, may be considered. *Semlar* v. *Ortwig,* 234 Iowa 233, 12 NW 2d 265.

"The Soldiers' and Sailors' Civil Relief Act does not contemplate conferring upon a soldier or sailor any privilege not enjoyed by a civilian but is merely intended to secure him in his legal rights until he may return and defend himself. *Tolmas* v. *Streiffer,* (La) 21 So. 2d 387.

"The act is not to be employed as a vehicle of oppression or invoked for a needless purpose, but is to be administered as an instrument to accomplish substantial justice. *Hunt* v. *Jacobson,* 33 NYS 2d 661, 178 Misc. 201.

"The act was not intended to give complete immunity from claims arising as a result of civil life and activities, and the provision should not be used as a sword to the detriment of the rights of others rather than a shield. *Isaacs* v. *Isaacs,* 37 NYS 2d 527. It was not intended to be used as a means of abuse. *Kelly* v. *Kelly,* 38 Misc. 2d, 344. The act should not be treated as a blanket moratorium on all litigation affecting servicemen. *David* v. *Brown,* 46 D. & C. 123. *Lawther* v. *Lawther,* 53 D. & C. 280."

The interest of Colonel Potts in this litigation is identical with that of his two brothers, both of whom are parties to this litigation. The interests and views of Colonel Potts have been presented fully and ably. We cannot think of a single contention, sound or unsound, which might have been advanced in addition to those heretofore presented on behalf of Colonel Potts and his brothers, and none have been suggested in the record or in the briefs. The estate is

being rapidly dissipated in costs of litigation. If it continues a shell only will remain. The substance will be gone.

(b) PETITIONERS CLAIM TO OWNERSHIP OF ENTIRE PLANTATION

If we correctly understand the contention of the Petitioners with reference to the ownership of the plantation in question, it is that the plantation, being ancestral property, must remain in family ownership. (For how long, we do not know). James Sheppard, the ancester, died in 1870, his will directed that the plantation be sold and that "my two executors are to unite and concur in the sale of my property in the State of Arkansas". The proceeds were then to be paid to the widow and children of the decedent. One of the executors was a resident of Virginia, and the other was a resident of Arkansas. James Sheppard left surviving him, a widow and four children. Instead of carrying out the direction of the will as to the sale of the plantation, the Arkansas executor deeded the property to the widow and four children. Whether or not this was done with the concurrence of the Virginia Executor is not now known. The four children were Annie E. Sheppard, Adam Empie Sheppard, Belle G. Sheppard and Katie E. Sheppard, Jr. Katie E. Sheppard, Sr. was the widow of the deceased. Annie E. Sheppard one of the children, married one Lurty and then died intestate and without issue. Katie E. Sheppard, Jr. married A. B. Guigon and died leaving one son surviving, namely, A. B. Guigon, Jr. Belle G. Sheppard married Joseph Schoolfield Potts, Sr., the mother of the three Potts brothers, two of whom are presenting the petition for writ of certiorari. Belle Sheppard Potts died in 1930 intestate leaving three sons surviving. The last surviving child of James Sheppard was Adam E. Sheppard who died November 29, 1934 tes-

tate, but without issue. A. B. Guigon, Jr. the son of Katie E. Sheppard, Jr. (Guigon) survived the said Adam Empie Sheppard, but died October 4, 1936. Thus upon the death of Adam Empie Sheppard, there remained alive four grandsons of the said James Sheppard, the ancestor. Each of these grandsons at that time stood in identical relationship to James Sheppard, namely, grandsons. Thus if the doctrine of ancestral property were applied to the plantation and all intervening wills disregarded, the three Potts brothers and Guigon would have become the owners of Sheppard Island Plantation upon the death of Adam Empie Sheppard. After the death of Guigon, the Potts brothers now claim that by some hocus pocus [redacted] the entire plantation is owned by the Potts brothers, although A. B. Guigon, Jr. devised his interest therein to his half sister, Lisa Guigon Shinberger. To follow the reasoning of the Petitioners, it would be impossible for an ancestral estate ever to be disposed of by will or devise by any heir to that estate. Manifestly, this cannot be the meaning of the Arkansas statute. We assume that if two of the Potts brothers should die then applying the same reasoning the third Potts brother would claim the entire property. What course that property would follow upon the death of the third Potts brother is exceedingly obscure.

The Supreme Court of the State of Arkansas considered this question under the laws of the State of Arkansas and in its opinion clearly disposes of this contention. It held in the first place that the property was not intended by the ancestor to be ancestral property, since by his will he expressly ordered its sale. It then pointed out that the property having been treated by all of the heirs of James Sheppard as the property of the four children of James Sheppard, (his widow having subsequently died), that it is too late now for the Potts brothers, three of the four grandsons, to assert that the property did not follow the course which all of the

children of James Sheppard considered that it did follow after the death of James Sheppard, and the conveyance of it by one of his executors.

In the brief in support of the petition, (pages 27 and 28) the ancestral property statute of Arkansas is discussed. The Statute does not justify the conclusion urged by petitioners and the Supreme Court of Arkansas so found. *Webb* v. *Cardwell,* 128 S. W. 2d, 691 122 A.L.R. 814 cited on page 27 of said brief does not in any manner sustain the contention.

The will of James Sheppard required his executors to sell the plantation but expressly provided that the proceeds from such sale should be paid over by the executors to the testator's widow and four children. The widow and the four children were the sole beneficiaries of the trust. In such a situation the beneficiaries of the said trust had the right to elect that the plantation be conveyed to them jointly without sale, and upon such election, it was the duty of the said executors to so convey it in lieu of selling the same.

In *Wooster* v. *Cooper,* et al, 59 N. J. Eq. 204, 45 Atl. 381, a decedent's will ordered his executors to sell certain real and personal property and to pay the proceeds to specified persons. The New Jersey Court in discussing the rights of the beneficiaries said:

> "The beneficiaries all appear, and, for the reasons stated, join with the complainant, Isaac Cooper, in electing to take the farm by conveyance, as land, rather than the proceeds of sale by division among them. There has been, as yet, no conversion under the power of sale. They all take the same shares, the same interest, by the same mode. No discretion is by the power given to the trustee, nor does the exercise of an election by the beneficiaries to take the farm as land appear to conflict with any purpose of the donor in making his

gift to them. In such cases equity will permit the beneficiaries to take the land, and will direct a conveyance to be made to them by the donees of the power, according to their respective shares. Craig v. Leslie, 3 Wheat. 578, 4 L. Ed. 460; Morse v. Bank, 47 N. J. Eq. 285, 20 Atl. 961, 12 L.R.A. 62."

In *Craig* v. *Leslie,* 3 Wheat. 578, 4 L. Ed. 460, the Supreme Court of the United States considered a similar question and in the head note to that case it is said:

"Equity considers land, directed in wills, or other instruments, to be sold and converted into money, as money; and money directed to be employed in the purchase of land, as land.

"Where the whole beneficial interest in the land or money, thus directed to be employed, belongs to the person for whose use it is given, a court of equity will permit the *cestui que trust* to take the money or the land at his election, if he elect before the conversion is made."

In discussing this question the court says:

"Thus where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust,* but will permit him to take the money or the land, if he elects to do so before the conversion has actually been made; *and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity.* It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest." (Italics supplied)

See also *Moore* v. *Barnard* 75 Colo. 395, 226 P. 134, *Prentice* v. *Janssen* 79 N. Y. 478 (aff. 14 Hun. 548) and *Sydnor* v. *Palmer* 29 Wis. 226, where it was said that such conveyance may be made to the beneficiaries with their assent or subject to their future ratification. The widow and all children elected to take or ratified the taking of the land in lieu of the proceeds from its sale, and held title to and possession of that land so long as each of them lived, the last one dying approximately sixty years after the election.

It is contended by the Petitioners that since the deed conveying the plantation to the Sheppard widow and children was executed by only one of the Trustees named in the will, that it was ineffectual to convey title since the will required the exercise of the joint judgment of both executors. Such a contention is without merit. The election of the beneficiaries to take the land instead of the proceeds of sale, relieved the executors of the need for exercising any judgment whatever. Thus, although the deed being executed by only one executor was defective yet the holding of said property for more than sixty years without question by anyone indicates clearly that neither executor objected to the method of handling the plantation and, thus, the court of equity properly supplied the defect.

A similar question was before the Supreme Court of Appeals in Virginia in the case *of Roberts' Widow and Heirs* v. *Stanton*, 2 Munf. (Va.) 129, where the Supreme Court of Virginia said:

> "A number of authorities have been cited to show that, although equity will not supply the non-execution of a power, yet it will supply any defect in the execution of a power, provided the same be for a good or valuable consideration. In the case before us, the trust or power was imperfectly executed; the conveyance of the land in question having been executed

> by one trustee only, instead of three; but it being for a valuable consideration, a court of equity may, I conceive, with propriety, supply the defect; so far, at least, as respects the appellants, who (we all agree) have no right to the land in controversy."

In *Brown* v. *Doherty*, 185 N. Y. 383, 78 N. E. 147, two executors were directed by will to sell real estate; the sale actually took place, but only one executor executed a deed. The New York Court very promptly corrected the defect, holding that equity would consider that as done which should have been done.

In the instant case, upon the election of the beneficaries to take the land rather than the proceeds, it became the duty of both executors to execute a deed to them. If only one performed his duty the other one could not defeat the wishes and election of the beneficiaries by refusing to do so. Equity will supply the defect.

CONCLUSION

We respectfully submit that the conclusions of the petitioner in its brief are not sound. The will of James Sheppard did not evidence any intention that the plantation should be kept in his family as ancestral property. It indicated exactly the opposite, since he directed that it be sold and the proceeds be paid to his widow and children as personalty.

The deed conveying the property, although executed by only one of the executors, should not now affect the title thereto since the defect has been cured by a court of equity.

No real reason has been advanced for granting certiorari on the ground that Colonel Adam Empie Potts is in the military service. He has received a fair trial and has been

fully and ably represented by eminent counsel at all stages of this controversy.

We respectfully urge that certiorari be not granted.

Respectfully submitted,

ARCHIBALD G. ROBERTSON
NORMAN L. FLIPPEN
A. S. BUFORD, JR.
A. F. TRIPLETT

Counsel for Lisa Guigon Shinberger, Sheltering Arms Hospital, Virginia Home for Incurables and Protestant Episcopal Church Home for Old Women.

September 8, 1949.

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Supreme Court of the United States

OCTOBER TERM 1949

Number 260

JAMES SHEPPARD POTTS and
ADAM EMPIE POTTS,
Petitioners,

vs.

J. K. RADER, as Administrator, etc., et al,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

SUPREME COURT HAS POWER OF SUPERVISION

May it please the Court:

Your petitioners are not unmindful that while the Supreme Court of the United States has wide discretion and

full power of supervision in all matters where the highest state courts have departed from the accepted and usual course of judicial proceedings, or where such has been sanctioned by a lower court, this power will not be exercised by the Court unless there are present special and important facts or circumstances which, in the descretion of the Court, call for an exercise of such power of supervision (Rule 38); and especially in a case where a federal statute or a Constitutional question is involved. Rule 38. We respectfully submit that in the instant case every reason, both moral and legal, demands the exercise by the Court of its power of supervision.

Nearly seven years ago the exercise of this power was assumed to be necessary, where it had been brought to the attention of the Court that it was probable that the Supreme Court of North Carolina had so offended when passing upon the same federal statute here involved; namely, the Soldiers and Sailors Civil Relief Act, 50 USCA, Appendix § 521. As a consequence, a *certiorari* was granted, and the case of *Boone* v. *Lightner* (319 U.S. 561, 63 S. Ct. 1223, 87 L.Ed. 1587) was decided by this Court. In that case, while there was a dissenting opinion, there was no dissent by any member of the Court that the statute in question should be liberally construed in favor of the claimant, and that no soldier nor sailor would be deprived of the protection granted by the Act. The rule of construction to be applied is found in the concluding paragraph of the majority opinion, which reads as follows:

> "The Soldiers and Sailors Civil Relief Act is always to be liberally construed to protect those who have been obligated to drop their own affairs to take

up the burdens of the Nation. The discretion which is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial." (Italics supplied)

The opinion then goes on to state the limitation, and the only limitation involved, the Court saying:

> "But in some few cases absence may be a policy, instead of the result of military service, *and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.*" (Italics supplied).

The approved rule of construction here given has been re-expressed by the Court in two subsequent cases, namely *Fishgold* v. *Sullivan Corporation*, 328 U.S. 275, 292, 90 L. Ed. 1230,66 S. Ct. 904 and 1105, and *Fontaine LeMaistre* v. *Leffers*, 333 U.S. 1-6, 92 L. Ed. 433, 68 S. Ct. 371 the latter being cited in our original petition, page 26.

With the flat assertion by the Supreme Court of Arkansas (219 S.W. 2d 769, 771) that Colonel Potts was not entitled to the relief sought, it is respectfully submitted that, at the hands of this Honorable Court, he is at least entitled to a full review of the record of the Court below in order that this Court may reach a determination as to whether or not the facts justify the harsh ruling reflected in the opinion and decision in this cause; and to this end the writ of *certiorari* is sought.

A casual reading of the Arkansas opinion, without minute examination of the record in the case, would seem in and of itself to show a factual background entirely different from that present in the *Boone* case and in other cases which denied relief under the Act.

But before reviewing other cases may we point out to the Court certain alleged facts and circumstances found in the instant record, in order that the good faith of Colonel Potts may be weighed.

In our judgement, the only way to reconcile the action of the Arkansas court in the instant case with the holding of this Court in *Boone* v. *Lightner*, is to assume that the Supreme Court of Arkansas, when deciding the instant case, relied too heavily upon what was brought before it by one of the counsel representing the respondents in the lower court and now of counsel in this Court, namely, on unsworn Statement of A. F. Triplett, of Pine Bluff, Arkansas.

If the Court will examine the record filed in this Court, commencing at page 169, they will find a paper signed by Mr. Triplett, entitled *"Motion To Dismiss Under Rule Five"*. This paper, comprising fourteen (14) pages of the printed record, carries the following endorsement:

> Respectfully submitted,
> A. F. TRIPLETT
> *Attorney for appellees.*
>
> Filed *Sept.* 28, 1948. C. R. Stevenson, Clerk." (R. 182).

The record shows that this paper was not verified, as is required under Rule 3 of the Arkansas Supreme Court, which Rules require that all such motions be supported by affidavit and proof of service upon opposing parties. There is nothing in the record to show that paper was so served;

but, regardless of these several essential requirements, the time of filing is definitely shown, and such ante-dated the decision and opinion in this cause, and was before the court when the case was decided.

In our opinion, whether it is considered as a pleading or argument, or whether intended as a method of bringing before the appellate court of the State of Arkansas sundry allegations alleged as statements of fact, this paper is most remarkable!

As we read the record in the instant case we find not a scintilla of evidence which, in our judgment, could have justified the lower court in holding that our client, Colonel Adam Empire Potts, or either of his brothers, for that matter, was guilty of an attempt to use improperly the provisions of the Soldiers and Sailors Civil Relief Act, as held by the Arkansas court in this case, for the purpose of delay, nor as stated in the opinion in this case "for the purpose of delay, as it was in the Boone case, supra". Nor do we believe that, after a careful examination of the record in this case, this Court can reach the conclusion, held by the Supreme Court of Arkansas, "that the principal reason for the long course of this litigation lies in the efforts of the Potts brothers to delay its submission for adjudication".

It is inconceivable that litigants with so much at stake possibly could be trying to delay a case in which they have exerted every effort to bring such to *trial on its merits* and to show that the stranger claimants have no interest and no title whatever in any part of the property which is primarily involved in the case at Bar. We say *primarily* advisedly, because there is only one real issue involved; namely, the *ownership* of the Sheppard Island Estate. There is, of course, the secondary matter, of an accounting between

those who managed the property previous to the institution of the suit and since. Of course, after the death of A. E. Sheppard, uncle of the petitioners, and after the institution of the suit, incidental matters such as rental of the estate, had to be considered; and such were considered, with the approval of the petitioners, a receiver was appointed, etc. But all of these matters were incidental to the primary matter; i. e., the title and interest in the estate.

So also all reference to the Virgania litigation was foreign to the issues involved in this case. The Virginia court had nothing whatsoever to do with the property located in Arkansas, and it could not have. And counsel for the respondents knew this; yet time after time, the record shows that they drag this "red herring" across the trail; until, after a long last, for which they appear wholly responsible, they succeed in getting even the Supreme Court of Arkansas to follow *this false trail.* However, when so following such, the Court is led into the error of falsely repeating what actually was said or done by the Virginia court. Stranger still, the Arkansas Court misquotes the Virginia case so often referred to, and that to the prejudice of the petitioners. We quote from the last paragraph found in the opinion of the *Potts* v. *Rader* case, at Record page 187. It reads as follows:

> "The Virginia trial court dismissed at least part of that litigation upon a finding that the progress of the case was being intentionally delayed,*and its action was affirmed.* Potts v. Flippen, 171 Va. 52, 197 S. E. 422. There are other instances which we need not mention. We conclude that the record is wholly lacking in evidence to indicate that the chancellor abused his discretion in refusing to stay the proceedings." (Italics supplied).

From comparison it will appear that the Honorable Justice of the Supreme Court of Arkansas followed closely and accepted the statements found in Mr. Triplett's pleading, *Supra* (R. 172), at their face value, even to the extent of perpetuating the errors found therein; as will be observed from the report it gives of the *Potts-Flippen* case (171 Va. 52, 197 S. E. 422) where, instead of the finding being as related by counsel (Triplett) and adopted by the Supreme Court of Arkansas in the concluding paragraph of its opinion, the decision of the Virginia court was just the *reverse* of the alleged holding of the Virginia court so asserted by Mr. Triplett, *supra*, and adopted in the opinion of Justice Smith. We quote from the last paragraph of Chief Justice Hudgins' opinion in the *Potts-Flippen* case, commencing at page 60 of the Virginia Reporter citation:

> "These pleadings, the time of their filing and the long delay in the prosecution of the suit, are not sufficient in themselves to establish the conclusion reached by the trial judge. The trial judge found as a fact that the delay in prosecution of the suit and filing of the amended and supplemental bill for the purpose of 'impeding and embarrassing the administration of the estate herein involved.' The evidence on which this conclusion was reached is not now before this court. *In the absence of such evidence we can not determine whether or not the trial court abused its judicial discretion in dismissing the case.* This is simply the application of the principle stated in the cases cited in support of respondents' motion to dismiss."
> (Italics supplied).

Again it will be observed that an effort was made by counsel for the respondents in the Arkansas court to prevent a hearing upon the merits of the case now considered, under existing Rule Five in that State; and yet, at the same time, said counsel was using every means in his power to prevent the evidence bearing upon the good faith of these litigants to become a part of the record in the case. It was only after persistent effort through *certiorari* that the petitioners herein were even permitted to file the transcript of the testimony in the Supreme Court of the State of Arkansas, as disclosed in the record at page 182. Even after the court granted this relief to petitioners, the court receded from such *per curiam* order entered on October 18, 1948 (R. 182), and granted the relief sought by Mr. Triplett in the so-called Motion to Dismiss (R. 169), as will be observed from the opinion under review (R. 185).

Review of Cases Cited by Respondents

In our original brief, at page 26, we called attention to the numerous cases cited in Federal Code Annotated, expecting that our opponents would cite any case they might find which they considered justifying or tending to support the holding of the Arkansas court.

In their response brief, on page 5, the respondents have used quotations purporting to be citations from *Glick Cleaning and Laundry Company* v. *Wade*, 206 Ark. 8, 172 S.W. 2d 929, and from *Brown Service Ins. Co.* v. *King*, 247 Ala. 311, 24 So. (2) 219; but we have read these cases carefully and find no language in the cases cited which sustains in the least respect the opinion in the instant case. These cases employ no such language as that cited in above cases as quotations.

In the *Glick-Wade* case, *supra,* the Laundry Company alone had appealed; and there was no relation between it and the service man, who was not considered a party to the appeal; the court held that appellant is protected; sufficiency of the bond is not questioned; no party is prejudiced by denial of continuance.

In *Brown Service Ins. Co.* v. *King, supra,* a stay of proceedings was granted the service man, as he was "materially affected by reason of his military service"; with the following observation by the Supreme Court of Alabama, and citations, in all of which cases the stay of action was granted the service man:

> "The Act must be liberally construed for the benefit of the service man." *New York Life Ins. Co.* v. *Litke,* 180 Misc. 297; 41 NYS (2) 526; 181 Misc. 32; 45 NYS (2) 576.
>
> *Nassau Savings & Loan* v. *Ormond,* 179 Misc. 447; 39 NYS (2) 92.
>
> *Courtland Savings Bank* v. *Ivory,* 27 NYS (2) 313.
>
> "The General purpose of the Act was to protect those in military service and to prevent injury to their civil rights during their term of service arising from judicial proceedings conducted against them in their absence. It was intended to relieve persons in military service from mental distress occasioned by the handicap of being in service, resulting in inability to meet financial and other obligations; and to foster a mental repose through the intervention of courts to the end that such rights and remedies shall not be imperiled in consequence of military service."

In *Ridley* v. *Young,* 64 Cal. App. (2) 503, 149 P. (2) 76, was involved a police regulation, not to be evaded. Defen-

dant was not present at the accident but admitted he owned the car, making him jointly liable under California law. This was admitted in his deposition, which was on file; his liability was established, and the court properly held his rights were not materially affected by denial of continuance.

In *Hunt* v. *Jacobson,* 33 N.Y.S. (2) 661, at pages 662 and 665, it is shown that the service man (Janpole), an attorney, had been served with notice, had filed no answer, had made no application for a stay of proceedings, and appeared to be "only a nominal party to the action"; hence, no prejudice could result to him from denial of stay of action. The court recognized the principle involved and says:

> "(1) Statutes enacted for the benefit of persons engaged in military service are a recognized institution in this country, and, being remedial, are to be construed liberally * * * possessing as they do, attributes of privilege and exemption; and it has been held that, even in the absence of such a statute, *public policy demands the recognition of such exemption.*" (Italics supplied).

On page 6 of respondents' brief there is a quotation apparently taken from the opinion in the case of *Semlar* v. *Oertwig,* 234 Iowa 233, 12 N.W. (2) 265; but the respondents have omitted the concluding clause of the citation, which says:

> "doubtful cases should be resolved in favor of the litigant in the service."

In this case the Iowa Supreme Court granted a stay of action "until such time as the military service of appellant, Oertwig, does not materially affect the defense of the appellants." In commenting upon the *Boone* v. *Lightner*

case (319 U.S. 561) and also *Glick Cleaning and Laundry Co.* v. *Wade* (Arkansas, 172 S.W. 2d 929) the Court analyzes the different circumstances appearing in each case. Referring to the Soldiers and Sailors Civil Relief Act, the Iowa opinion states:

> "(7—8) The statute being an Act of Congress, we will be guided by the decisions of the highest federal courts in their interpretation of its various provisions. It is our conclusion that these decisions and the preponderant weight of the decisions of the state courts are against the grounds urged by the appellees, and held by the court, for denial of the continuance.
>
> (10—12) It is quite generally held that the granting or refusal of a motion for continuance is discretionary with a court, but this presupposes the exercise of a sound judicial discretion, to the end that, so far as possible. injustice will be done to no party. This is particularly true where a refusal to grant the stay prevents the personal participation of a party in the trial, and, in substance, denies him his day in court. The expressed purpose of this Act, and the construction put upon it by both state and federal courts, make it clear that, in refusing a stay, a court should be very certain that its decision, in the individual case, is not defeating the purpose of the Act. . . . We therefore hold that the motions of the appellants should have been granted as to each defendant until such time as the military service of appellant (Oertwig) does not materially affect the defense of the appellants. Reversed and remanded."

(The same general thought is covered by a former opinion

of the Arkansas court in the case of *Reynolds* v. *Haulcroft* 205 Ark. 760, 170 S.W. 2d 678), referred to by us in our opening brief, at page 26).

Tolmas v. *Streiffer* (La.) 21 So. 2d 387 (Mch. 12, 1945), was an action to recover premises on expiration of lease. The Soldiers and Sailors Civil Relief Act was held inapplicable to the circumstances of that case.

In *Isaacs* v. *Isaacs,* 37 N.Y.S. (2) 527, at 528, cited by respondents at page 6 of their brief, the Court held:

> "If it should appear at any future stage of the proceedings that the defendant's rights may be prejudiced as a result of non-availability due to his military duties, resort can be had at such time to the protection afforded by the Statute." New York, Military Law, Sec. 304. See also 36 N.Y.S. (2) 651, where stay previously was granted to this same serviceman, a "defendant in military service and not available."

Kelly v. *Kelly,* 38 N.Y.S. (2) 344, cited by respondents, a case under New York Statute, deals with support of infant children:

> "An Army man has his national obligations and obligations to support his children, and courts when asked to stay an action against an Army man for *support of his children* are called upon to exercise a *sound discretion,*" (Italics supplied).

> "The federal statute for the civil relief of Soldiers and Sailors was not intended to be applied without restrictions nor to be used as a means of abuse. Soldiers and Sailors Civil Relief Act, 1940, Sec. 203, 50 U.S.C.A. Appendix Sec. 523."

Surely, these cases found in the respondents' brief add nothing to the opinion of the court. We wonder why they were cited at all by opposing counsel, as they are not in point except where they lend support to the petitioners' case, such as the Iowa decision in *Semlar* v. *Oertwig,* supra, and other cases reviewed.

Respondents have not cited a case nor an authority which would support the decision of the Arkansas court in the instant matter.

It is only too obvious that the reason why respondents have not cited cases resting upon *Boone* v. *Lightner* is due solely to the fact that *no case is to be found* which supports or justifies any conclusion that the *Boone* v. *Lightner* case is a bar or barrier to this Honorable Court in affording to the petitioner the relief for which he prays and to which he is entitled under the provisions of the Soldiers and Sailors Civil Relief Act of 1940 and amendments.

We had wondered whence came the quotations found in respondents' brief, until, when reading the Triplett paper, we found in the record, at pages 173-174, that the same inappropriate cases had been furnished the Supreme Court of Arkansas also!

One of the most significant circumstances found in the record in this connection is carried in the 5th headnote found in the opinion, which reads as follows: (R. ~~158~~. 185

> "We need not pass upon the question of whether the chancellor should have ordered a division in kind instead of partition by sale. Most of the evidence on that issue was taken before the entry of the order of November 1, 1947, by which the chancellor refused to vacate his earlier decree. The transcript of that

testimony was not filed here until October 20, 1948 —long after the time allowed by our Rule 5. We therefore sustain the motion to strike this testimony from the record and without it we must assume that the evidence supported the chancellor's action."

From this it will be observed that, while the court had before it the transcript of the lower court (R. 182), they declined to consider the testimony taken expressly for use in the appeal (R. 150-151); apparently sustaining the motion of Triplett (R. 169), which in itself had failed to comply with a far more important rule of the Supreme Court of Arkansas, namely, Rule 3, requiring that no pleading shall be admitted or considered unless supported by affidavit and proof of service upon opposing parties. And still more significant in this connection is the *use* made by the court of this discarded testimony, when holding (under the first headnote) that the petitioners were estopped from claiming under the will of their ancestor, James Sheppard, because, in the language of the court, "Only the beneficiaries of the will could complain of the executors' failure to carry out instructions, but they accepted the deed and recognized its validity, as has the whole family for over sixty years." This is the very point which petitioners are contesting, and it constitutes the whole issue in this case.

This Court can hardly say that the discretion of the lower court was not abused where the record, without denial, shows that the applicant for relief here, under the Soldiers and Sailors Civil Relief Act, never was given an opportunity to present his testimony in the case, and yet, such Court holds, that title to real estate may pass by equitable estoppel, without giving the party an opportunity to testify concerning the facts upon which such estoppel is based. In so holding, the

Court through the application of Rule 5, tosses out of the window such evidence as was introduced by the two brothers of Colonel Potts, and then fails to afford Colonel Potts the privilege of testifying as to his knowledge of the facts involved, upon which such estoppel is predicated. (R. 185).

And, to show how casual, if not careless, the Court was, the opinion (R. 185) recites that "throughout this litigation both appellants have asserted an interest in the property under their *mother's will.* She was a grantee in the Executor's deed and derived her title from it. The appellants cannot claim title to part of the land in reliance upon the deed and at the same time claim the rest upon the theory of invalidity." (Italics supplied).

The record shows that the mother departed this life intestate (R. 2 and 139). With the fallacy, the conclusion is void.

Fee simple title to real estate can pass only by deed or will; not by estoppel (our original petition, p. 13). The learned Judge in the case under review cites in support of the proposition stated above *Wood* v. *Haye,* 206 Ark. 892, 175 S.W. 2d 189. This case did not involve fee simple title to real estate but merely a description in a mining lease. The authorities to the contrary are overwhelming.

Further, from an examination of aforesaid "Motion to dismiss" (R. 169-182) and a comparison of such with the opinion rendered in this cause by the Arkansas Supreme Court (R. 184-187), it appears that the appellate court there has completely disregarded the record when seeking the facts in this cause and has patterned its decision and opinion largely according to the views and misstatements found in the unsworn paper in that motion by "A. F. Triplett, attor-

ney for appellees," It is submitted that even a casual reading of the opinion of the Arkansas Supreme Court, with a parallel reading of the Triplett paper, will impress this Court as to such adoption.

From the concluding paragraph of its opinion in this cause (R. 187), it is evident that the decision of the Supreme Court of Arkansas was influenced, consciously or unconsciously, by A. F. Triplett's misstatement of the Virginia litigation (which properly had no place whatsoever in the instant case). (See Record page 176.)

It is remarkable that respondents have ignored the one outstanding case which these lawful heirs have succeeded in bringing to trial on the merits (and *by such trial they have prevailed*), the case in Virginia of *Potts* v. *Rader* (179 Va. 722, 20 S. E. 2d 690), which, in fact, was a combination and culmination of all the Virginia suits, where litigation in that State was decided in favor of the petitioners herein. Yet, in the "motion to dismiss", *supra*, Mr. Triplett has avoided any mention of this important and relevant Virginia case, as also has the Arkansas court. If the unrelated litigation of a foreign State was to be so brought into the record, it would seem that this case also would have been included.

In an apparent effort to influence the Arkansas court while considering and acting upon the appeal therein, the opening paragraph of the Triplett "motion to dismiss" shows an attempt to reflect upon petitioner James Sheppard Potts, alleging that he "had gotten all the rents for 1936, without

accounting to the other owners, and that unless a receiver should be appointed, the same result would occur in 1937." A statement of such nature, inserted in an unsworn statement filed in the appellate court, could have been inserted for one purpose only; i. e., to prejudice the court, solely to influence the appellate court in passing upon the good faith of a litigant.

The record shows respondents were well aware that James Sheppard Potts voluntarily always had made a full accounting and disbursement of all rents and revenues collected by him and that said accounting was filed as an exhibit to his answer in this cause (R. 10-12), although lawfully he could not be required to make such accounting. Mr. Potts is sustained further by the uncontradicted testimony of S. L. Pake, the respondents' own witness, who testified that "Mr. Potts advanced money to repair the houses and buildings" (R. 133). Yet, despite said full accounting and the further proof by respondents' own witness, the record shows large sums withheld from James Sheppard Potts, on the false pretext of indebtedness, and confirmation of same in the decree entered by the trial court on September 2, 1947 (R. 108).

According to the record, and according to respondents' own admissions in the record, of delays not attributable to Mr. Potts (R. 178 and 180), just *what* delays were attributable to petitioner James Sheppard Potts or his brothers? The answer is that *no delays* were attributable to any of the petitioners herein but that every delay in this litigation appears to have been due to the influence of counsel for the respondents, who has had control of the litigation in Arkansas from the start.

The foregoing is an example of the unfair tactics employed by the respondents herein.

On page 2 of their response brief, the respondents make the bald statement naming the three Potts brothers as plaintiffs in a Virginia suit attacking the alleged "will" of A. E. Sheppard, which statement, of course, is incorrect—and such certainly had no place in the instant suit, except in the persistent attempts of respondents, to confuss the issues here, as in the lower court, to the prejudice of the petitioners. The estate of A. E. Sheppard has nothing whatever to do with the instant suit, which concerns only the Arkansas estate of his father, James Sheppard, grandfather of the petitioners herein.

At page 3 of their brief, respondents state that this cause was instituted in 1937 and was "actively litigated" from that time. Yes, this is true, as it was very actively litigated *among the respondents themselves* in their private controversy as to which of them should receive the major portion of the property belonging to the petitioners. This internal strife was not settled among themselves until late in 1941 (R. 40). Yet, with this fact undisputed, and the record showing the other delays caused by the respondents, we find Mr. Tripltt telling the Supreme Court of Arkansas that Colonel Potts and his brothers are responsible for a delay of *eleven years* (R. 171) in bringing this suit to a close; and the worst of it is, that he put this over to the Supreme Court of Arkansas (R. 186).

If this Honorable Court will read the opinion of the Arkansas court (R. 187) as parallel with the Triplett paper (R. 176), it will see very plainly the impression produced.

The internal strife among the respondents was known as *Sheltering Arms, etc.*, v. *Shinberger*, 201 Ark. 780, 146 S. W. 2d 921, a suit seperate and independent of the instant cause, and decided adversely to Triplett's client. It had

no bearing whatever on the rights and claims of the petitioners herein.

Colonel Potts Not Represented By Counsel

There is nothing in the record to show that Colonel Adam Empie Potts ever was represented by counsel in the trial court (except as accommodation, to plead his military service and exemption) nor that his interests would not be prejudiced by perm tting this matter to proceed in his absence in military service—but *exactly to the contary* (R. 124; 143; and R. 47-48; 114; 141; 143; 145; 147); and Colonel Potts is not "still trying to obtain an extension of time" but is asking this Honorable Court for a writ of *certiorari*, to enable him to bring this matter to trial *upon the merits of the cause* at the earliest possible moment. It never has come to trial on its merits concerning the estate of James Sheppard, and such trial is what the petitioners now are asking.

Due Process of Law

On page 4 of their brief, we sse again respondents' attempt to inject into even these proceedings in the Supreme Court of the United States the motion which they made in the Arkansas court and by which they again attempt to deprive petitioners of their inherent right to due process of law and to the equal protection under the law to be had by trial on the merits of this cause.

This motion to Dismiss under Rule Five was totally improper and, we contend, should not have been considered by the Supreme Court of Arkansas, as the entire record and its procurement were under the control of the *Arkansas courts*

and were in the possession of the courts. The petitioners had no control over such. Appeal was taken in ample time and writs of *certiorari* issued properly for the *"full, true and complete* transcript of the record and proceedings" (R. 159 to 166), commands which the clerk and the reporter of the trial court could not lawfully ignore; and the Supreme Court or Arkansas erred grievously in arbitrarily placing the fault upon the appellants (petitioners herein), who at all times were making every effort to get the record *in its entirety* bofore said court. The testimony withheld by the clerk and reporter of the trial court was the very testimony taken *expressly for use in said appeal,* which is shown by the record (R. 150-151).

On the first writ of *certiorari,* the clerk's return made excuse for *not* making out and certifying the transcript (R. 160). On the second writ of *certiorari* the clerk wrongfully certifies "that I have made out and certified a full, true and complete transcript of the record and proceedings in said cause, which is hereto attached" (R. 161-162). Upon appellants' discovery of the errors and omissions a third writ of *certiorari* was issued to said clerk, whose return then admitted he had *not* supplied the 'full, true and complete transcript", and attempted to excuse and cover up his dereliction by an alleged "certificate" (not verified) from one "Jack Segars, Official Reporter of the Jefferson Chancery Court", with the startling and unbelievable statement that he had been *ordered to omit the very testimony which he, as court reporter, knew was taken expressly to be used in said appeal!* (R. 163) In said "certificate" he asked for an extension of time within which to file the transcript, and it was *granted* to him *by the Supreme Court of Arkansas.* That was July 12, 1948; and after a *fourth* writ of *certiorari* (R.

166), the record shows it was filed October 20, 1948 (R. 185)—after A. F. Triplett, counsel for appellees, on September 28, 1948, had filed his motion to dismiss under Rule Five (R. 169-182)—and thereby afforded the Arkansas Supreme Court an excuse to dismiss petitioners' cause.

Ancestral Estates in Arkansas

It is generally known and well established that, under Arkansas statutes of descents, only persons of ancestral blood may inherit an ancestral estate, defined as follows:

"Land is to be considered an ancestral estate within statute of descent and distribution, when it comes by gift, devise or descent either mediately or immediately from father or mother, or from any person in their respective lines." *Webb* v. *Caldwell,* 198 Ark. 331; 128 S.W. (2) 691; 122 A.L.R. 814.

"The purpose of the statute creating ancestral estates was to keep such estates in the line of the blood from whence they came, and blood must be the only consideration by which they are acquired". Pope's Digest 4347 (Arkansas).

The will of James Sheppard shows very definitely his full intention that only those of his own blood shall receive the proceeds and benefits of his life's labors. This is emphasized in the opinion rendered in a suit in the Supreme Court of Appeals of Virginia, in the case of *Potts* v. *Rader,* 179 Va. 722, decided in favor of these Potts heirs of the Sheppard family. The opinion in the case written by Justice E. W. Hudgins, now Chief Justice of the Virginia Court, says:

"The intent of a testator must be collected from the language of the will examined as a whole, giving force and effect to every clause".

"In construing a will, it is not to be presumed that the testator used an unnecessary word or one to which no force could be given."

The court held 'That the first class of remainders created by the will was contingent upon the death of the life tenants with *issue* surviving and if this condition was not fulfilled there was a gift over, and at the death of the last survivor without *issue* his share of the property descended to the heirs of the other beneficiaries." (Italics supplied).

"Numerous decrees have been entered construing the will, dividing the property and distributing the income. Some of the decrees construing the will seem to be conflicting. Under these circumstnaces, we approach the solution of the question involved, first, by attempting to determine the intent of the testator from the will itself, independently of the decrees entered in the cause."

"The intention of the court in drafting the decree is not the dominant factor. The intention of the testatrix is the mater of vital concern."

"The intent of the testatrix is the polar star for the guidance of the court. This intent must be collected from the language of the will examined as a whole, giving force and effect to every clause. It is not to be presumed that the testatrix used an unnecessary word or one to which no force can be given. Harrison on Wills, Sec. 185; *Shepard's Heirs* v. *Shepard's Estate*, 60 Vt. 109; 14 Atl. 536.

It appears that all Arkansas cases have been determined and decided in accordance with this principle, as evidenced by the case of *Jackson* v. *Robinson*, 195 Ark. 431-435; 112 S. W. 2d 417, at 419, wherein the Supreme Court of Arkansas, in its opinion, cited:

"All of our cases are to the effect that the object in construing wills is to ascertain the intention of the teatator. This must be done from language used as it appears from a consideration of the entire instrument, and when such intention is ascertained it must prevail, if not contrary to some rule of law, the court placing itself, as near as may be, in the

position of the testator when making the will". *Witten* v. *Wegman,* 182 Ark. 62; 30 S.W. (2) 834.

The opinion of the court continues: "If it had been the intention of the testator to give her (his wife, who was co-executrix) the property in fee simple, there would have been no necessity to say that she might have power to sell jointly with the executor. If the property had been given to her in fee simple, there would be no reason to say anything about her power to sell. She would necessarily have had that power. But when the testator stated that she, jointly with the executor (A. W. Jackson) had power to sell, it *necessarily* meant that she was given a life estate with power to sell, jointly with the executor."

This bears out the principle also that the failure of a devise to a class, by decease of one or all of its members, vests the legacy or devise in the *survivors* of the next *class* of *nearest kin* to the original testator.

The said respondents, by the very nature of their response brief, actually and substantially admit the validity of petitioners claim to ownership in its entirety all of Sheppard Island Plantation, in Jefferson county, Arkansas, title to which property is the subject of this suit.

By their own arguments, respondents admit the invalidity of the "deed" attempted by one B. F. Richardson; and the respondents themselves attempt by *surmise* to show some way by which title may be passed to them as strangers.

"The land goes to the heir at law".

"Courts are not at liberty, in the absence of words showing such intent, to presume the testator intended to pass the lapsed lands away from the heir".

Galloway v. Darby, 105 Ark. 558, 151 S.W. 1014; 6 Paige Ch. (N.Y.) 611; 1 Willes Rep. (Eng. Ch.) 296; 3 Harr. & McHenry (Md.) 333; 4 Paige Ch. (N.Y.) 117; 13 How. (U.S.) 390; 86 Pa. St., *Yard* v. *Murray*; 1 Swanst. Eng. Ch. 570; 23 N.Y. 312; 79 N.Y. 346; 62 Oh. St. 414; 2 Blackstone 737; 6 Conn. 304; 36 Pa. St. 113; 3 Munf. (Va.) 77; 62 Conn. 142; 94 Md. 463; etc. "The doubt shauld be resolved in favor of the the heir at law". 18 How. (U.S.) 300; 16 Vesey Jr. 451; 1 Hill Ch. (S.C.) 96; 19 Oh. 334. "On lapse of devise, property goes to residuary legatee and not to the heirs". 51 Ark. 61—etc.

"It becomes no man and no court to be wise above that which is written", said Judge Sharswood, 64 Pa. St. 9.

In the entire record and in their own response brief there is not one place where the respondents have shown that they have any title or anv interest in this Sheppard Island Plantation.

The record shaws (R. 170, line 28; 185) that respondents and the Arkansas Supreme Court admit the invalidity of the alleged "deed" whereby one B. F. Richardson attempted to convey this Sheppard Island property to the widow and children of James Sheppard.

It is not contradicted that said attempted "deed" was void and that said widow and children of James Sheppard accepted a life estate only; as to them the legacy lapsed.

And the decease of A. E. Sheppard, last of the children of said James Sheppard, ended the class in being in 1870 at the time of the decease of said James Sheppard; and upon decease of said A. E. Sheppard, in 1934, the grandchildren

of said James Sheppard immediately took fee simple title and took possession and control of said Sheppard Island Plantation and never have relinquished such title nor possession of said property. There have been *no laches* and *no acquiescence* on the part of these the lawful heirs.

Nothing in the record shows that James Sheppard had any intention to disinherit his grandchildren as his heirs; but the record *does* show that James Sheppard's full intention was to privide for the "descendants" of his children, to benefit those of his own blood, and them only.

Nothing in the record shows that the respondents have any interest nor title in or to any of the property devised by said James Sheppard; but the entire reecord *does* show that the respondents, with no title and no interest whatever, have attempted to *assume* ownership and upon this assumption to demand a partition suit, their attempt to take over this entire property through a "partition sale" to "purchasers" of their own choosing and upon their own terms and for their own advantage and profit, to divest these lawful heirs completely.

Conclusion

Upon a review of the facts and circumstances appearing in this record, we respectfully submit that the Supreme Court of Arkansas should not have denied—but welcomed—an opportunity to review the action of the lower court upon its merits, and that a denial by the Supreme Court to consider any portion, fact or circumstance, under application of Rule 5, was unjustifiable when considering the rights of any of the litigants here involved; but as to Colonel Potts its refusal constituted grave error which in and of itself amounted to a denial of due process of law as contemplated under Article XIV of the Constitution of the United States.

In the first place, the Court never should forget that the record definitely shows that Colonel Potts was not represented by counsel in this case. The nearest approach even to a claim to any representation by counsel in his behalf, if any, is summarized in the opinion of the Supreme Court itself found in the record at page 186, the court emphasizing that Colonel Potts had been in the regular Army years before the suit was filed, and that "by his own admission he relied upon his brother James to attend to matters pertaining to the plantation. In 1939 he joined in a verified motion for a continuance upon the ground alone that James was informed as to the details of this case and was too ill to appear as a witness." The point was stressed by the court as grounds for the assumption that Colonel Potts, if called as a witness, would afford little assistance in the defense of the case. As a matter of fact, the court knew that Colonel Potts was not represented by counsel in these proceedings and the court further knew that as early as June 1943 Colonel Potts had plead the statute here involved and that he had again claimed protection thereunder as late as November 1, 1947 (R. 47; R. 120).

The Court knew that Colonel Potts was relying upon the protection afforded him under this Act. It certainly would seem, therefore, that a final determination affecting the rights of the parties, including Colonel Potts, should not have been indulged without some assurance that Colonel Potts himself had been informed by the court that it was going to accept a deleted record because a motion had been made by counsel for his opponents under a sumptory rule of the court.

In the next place, we confidently submit that the Supreme Court of Arkansas was under no legal obligation to apply

Rule 5 when passing upon this case. The court had discretion in the matter, and this discretion should have been exercised in favor of Colonel Potts and his brothers.

And again the Court will observe that, aside from its general control of the record in the lower court after *certioraris* had been requested on behalf of the litigants, the Supreme Court of Arkansas itself in its order *per curiam* entered as late as October 18, 1948 (R. 182), permitted the full transcript to be filed, reserving all rights in the premises, however, until the cause was considered on its merits.

Again it is brought to the attention of the Court that the Arkansas court was not required to apply Rule 5 *mero motu*. Counsel for the opponents never so asserted but, to the contrary, counsel based its request upon a written motion found in the record (p. 169), which motion as urged *supra* itself failed to meet another rule of the Supreme Court of Arkansas, namely, Rule 3, which provided that all such motions in the Appellate Court must be supported by affidavit and proof of service on opposing counsel, neither of which requirements, as disclosed by the record, was complied with in this case.

Would it be facetious for us to suggest to the Court that in the present instance it would have been more becoming for counsel to have removed the beam from his own eye before attempting to find the mote in his brother's?

Finally, it will be remembered that Colonel Potts' application for relief in the present instance is directed to the action of the trial court in 1942-1943 and thereafter, while he was engaged in military service.

The order *per curiam* entered by the Supreme Court of Arkansas in this cause, on October 18, 1948, was clearly

an exercise of the court's discretion and expressly suspended the operation of its Rule 5 to meet the emergency which had been caused by the lower court in this case; and when the appellants (petitioners herein) had accepted and complied with said order and had filed their pleadings in full compliance therewith, the Supreme Court of Arkansas was estopped from receding from its said order *per curiam* after such compliance in good faith by the petitioners—and thereby deprived the petitioners of their rightful due process of law.

A copy of this brief was mailed to counsel for the respondents on October 14, 1949.

Respectfully submitted,

ALEXANDER H. SANDS,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM 1949

Number 260

JAMES SHEPPARD POTTS and
ADAM EMPIE POTTS,
Petitioners,

vs.

J. K. RADER, as Administrator, etc., et al,
Respondents.

PETITION FOR REHEARING AND RECONSIDERATION OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners in above-entitled cause respectfully petition this Honorable Court for rehearing and reconsideration of their petition for a writ of *certiorari* to be directed to the

Supreme Court of Arkansas; and the petitioners hereby certify that this petition for such rehearing and reconsideration is not for the purpose of delay but, to the contrary, is in an effort to secure to them a fair and impartial trial on the merits of their cause at the earliest date possible, that petitioners shall regain control of their property and its benefits without further delays which heretofore have been imposed upon them by the respondents herein.

In presenting this their petition as aforesaid, the petitioners are filing same in the belief that their original petition and supporting brief, while clearly bringing out the facts of the cause, were not sufficient to impress upon the Court the full merit and importance of petitioners' case, important to not only these petitioners but to the general public, and the significance and disastrous nation-wide consequences which may result from a failure by this Honorable Court to review and correct the errors and evil consequences resulting from the decision of the Supreme Court of Arkansas in the case here sought to be reviewed. In the hope that this Honorable Court will consider this a matter sufficiently special and important to justify and to require the exercise of its power of supervision, the case again is brought to the attention of the Court, in this petition for rehearing on its refusal to consider the case presented as originally prayed.

In connection with this petition, it is appropriate to inform the Court that these petitioners complied with every requirement to print and file promptly herein their brief in reply to respondents' brief and that said reply brief was completed on October 14, 1949, and filed in this Court on the morning of Saturday, October 15, 1949, and that *certiorari* was denied on the morning of Monday, October 17,

1949; for which reason these petitioners feel that their reply brief was not before the Court in time for such to be considered by the Court when finally acting upon the original petition of these petitioners.

It respectfully is submitted that the reply brief heretofore filed herein, as aforesaid, contains many pertinent and enlightening facts not previously discussed, and the petitioners pray that their said reply brief now be considered along with this their petition for rehearing and reconsideration.

This Court has exercised its power of supervision and has given relief in cases where the service man was prejudiced far less than in the instant situation; notably among these being *Fontaine LeMaistre* v. *Herman Leffers,* 333 U.S. 1-6, 92 L.Ed. 433, 68 S.Ct. 371, wherein the service man was protected from a tax deed against his property; and *Abraham Fishgold* v. *Sullivan, etc., Corporation,* 328 U.S. 275, 90 L.Ed. 1230, 66 S.Ct. 904 and 1105, wherein the service man was restored to his employment seniority, upon his release from the military service. The instant case, insofar as Adam Empie Potts, concerns a service man and a large and valuable cotton plantation which has been owned by his family for three generations, and which was taken from him in his absence while in military service, and while not only actively engaged but in strenuous combat with the enemy. If this Honorable Court permits such decision to stand, it will cast a permanent reflection upon both this soldier and his family and also will deprive him of his lawful inheritance.

This matter concerns Colonel Potts not as to valuable property alone, property which long has been in his family, but more than this, far more than this, because the opinion

of the Arkansas Court has put upon Colonel Potts a perpetual stigma, likening him to the litigant in *Boone* v. *Lightner* (319 U.S. 561), making it appear that Colonel Potts, a capable and distinguished soldier and honorable gentleman, has prostituted his office deliberately, when seeking the protection of an Act made and provided by the Congress of the United States for the benefit of those compelled to be absent in military service! That there be no mistake, we quote from the opinion of the Arkansas Supreme Court (beginning the last paragraph on page 186 of the record):

> "The record justifies the conclusion that the appeal to the federal statute is made for the purpose of delay, as it was in the *Boone* case, *supra.*"

What conceivable reason could this litigant have for delay, when strangers have taken over his plantation and are sapping his revenues? The reason for this appeal is to enable him to gain a speedy trial on the merits of his cause.

And to what "record" does the foregoing opinion refer, may we ask?

In said opinion (R. 185, near bottom of page) the Arkansas Supreme Court says:

> "We therefore sustain the motion to *strike this testimony from the record,* and without it we must *assume* that the evidence supported the chancellor's action." (Italics supplied)

From this it will be seen that the Arkansas Supreme Court's opinion was not at all based upon the record but was upon a mere *assumption*—after the court had stricken

from the record the evidence favorable to the petitioners herein!

And *why* was this evidence stricken from the record? The court's excuse was that a portion of the transcript, containing the testimony and other evidence taken *expressly for use in such appeal,* was delayed by the reporter of the trial court and filed late and, therefore, *could* be stricken under its "Rule 5." Yet, the portion of the transcript containing that testimony *had been filed* with the Supreme Court of Arkansas *upon that court's own orders,* which, under Arkansas statutes, suspends operation of said "Rule 5." The statute, section 2741 of Pope's Digest (Arkansas Code), reads:

> *"Copy of record filed.* It shall be the duty of the appellant to file in the clerk's office of the Supreme Court, within ninety days after the appeal or writ of error is granted, an authenticated copy of the record, otherwise his appeal or writ of error shall be dismissed; *but the Supreme Court may for cause shown extend the time for filing such copy."* (Emphasis supplied)

The Arkansas Supreme Court had issued four writs of *certiorari* commanding the trial court's delivery of such copy of the record (R. 159 to 166), in accordance with Pope's Digest section 2743. On July 12, 1948, the court reporter of the trial court had made excuses and had asked an extension of time (R. 163) within which to deliver said transcript of the record, and the Arkansas Supreme Court had granted him such extension. By its own order *per curiam* (R. 182) entered on October 18, 1948, the Arkansas Supreme Court admitted said transcript of record to be

filed—in accordance with the statute, section 2741 of Pope's Digest, upon which such Rules of the Supreme Court of Arkansas are based [see Rule 7(b)]. [These Rules are carried in a prefatory appendix to volume 207 of Arkansas Reports (207 Ark.), pages xvii to xxxvii.]

By its above-stated action, these petitioners contend that the Supreme Court of Arkansas violated not only its own Rules and its own orders based upon statutory requirements, and thereby abused the discretion vested in it as a court, but it thereby violated also the statutes covering and regulating such Rules and such orders; in all of which it is guilty not only of violating the laws of Arkansas but in so doing it has broken faith with the appellants (petitioners herein) and has denied them the due process of law and equal protection under the laws as their inherent rights guaranteed to them by the Constitution and laws of the State of Arkansas and by the Fourteenth Amendment to the Constitution of the United States of America.

Petitioners submit that this presents a nice question and a special and important reason for exercise of this Court's power of supervision for review on writ of *certiorari.*

MILITARY SERVICE PREVENTS DEFENSE

The action of the trial court which these petitioners now are endeavoring to correct was that which took place during World War years of 1942-1943 and thereafter, while petitioner Adam Empie Potts was actively and strenuously engaged, as a colonel of anti-aircraft artillery, in the military service, defending our nation. During the four years prior to that time, the respondents (then plaintiffs) themselves had delayed the progress of this case, while they were actively litigating *among themselves,* in a suit which did not

concern nor affect these petitioners and of which these petitioners knew nothing at the time (*Sheltering Arms, etc.*, v. *Shinberger*, 201 Ark. 780, 146 S.W. 2d 921). After which the respondents again delayed the instant suit, by surveys of the property (R. 49-88) and other methods, covering several years more, while they derived from it handsome revenues, from high-priced cotton, which revenues rightfully belonged to these petitioners; which policy the respondents continued until after the actual fighting and enthusiasm of the war had ceased (and the prospect nearing that Colonel Potts and his brothers soon would come in for their rights), then the respondents closed in for their final decree in September 1947, after petitioners had been denied trial on the merits of the cause during the earlier stages of this litigation, in 1942-1943, when petitioner Adam Empie Potts' motion for stay of action had been ignored and, later, denied by the trial court, at a time when his absence in active military combat service prevented his doing anything in his own behalf, except by proxy to plead his immunities under the Soldiers and Sailors Civil Relief Act of 1940 and amendments.

Final action of the trial court was accompanied by many variations (R. 88-110; 112-113; 120-123; 127-129; 129-131; 154), appeal from which these petitioners were granted (R. 123) and took to the Supreme Court of Arkansas (R. 159); and it is the most unusual and unjustified action of the Supreme Court of Arkansas (R. 183-187; 194) which these petitioners now ask to be reviewed by this Honorable Court and for which a writ of *certiorari* now is prayed.

The record shows throughout that petitioner Adam Empie Potts was a necessary witness at any stage and at all stages of the proceedings (R. 5-10; 47-48; 114-116; 119; 139;

141; 143; 145-147; and all through the record), for his brothers as well as for himself, and that his active military service prevented his attendance. Upon decease of their mother, Mrs. Isabelle Sheppard Potts, intestate, in 1930, said Adam Empie Potts had been appointed administrator of her estate (R. 139) and, as such administrator, had in his possession all of her records and business papers concerning this Arkansas property (R. 141). These documents and business files are voluminous and, due to his military service, were packed in numerous boxes and trunks, along with other personal possessions of said petitioner, and stored in various places of safety (R. 146) and they could not be located nor identified by anyone but petitioner Adam Empie Potts personally (just as would be the case with the private business files of any business or professional person).

After the delay incident to the repondents' own internal litigation, that litigation was terminated by decree on mandate (R. 40-44) shortly before the attack at Pearl Harbor, which brought our nation into active combat. At the Pearl Harbor attack, petitioner Adam Empie Potts took an active part in the defense, as the colonel whose regiment is credited with shooting down the first Jap planes of World War II. With his responsibilities so vitally important to our National defense, it would have been impossible for him to have obtained an indefinite leave of absence, possibly several years, to defend his private property rights in Arkansas; indeed, it would have been impossible for him to have had a single moment except for the then all-important matter of the military defense of our nation, and it would have been utterly useless and worse than ridiculous for him to have requested or even to have mentioned such a leave of absence, either then or in the years ensuing, until his release from active duty, on January 1, 1949.

Under the circumstances, the petitioner did the only thing he could do, he did what the Congress of the United States commanded him to do and for which the Congress had provided, he claimed his immunities under the Soldiers and Sailors Civil Relief Act and asked the trial court for stay of action as expressly provided in said Act, as required by emergent war-time conditions and as demanded by Public Policy, to insure to petitioner a trial on the merits of his cause, to insure to him his inherent rights to due process of law and equal protection under the laws as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States of America.

These petitioners are not debtors nor alleged wrong-doers nor are they seeking immunity from any obligation, but they are defending their family estates against utter strangers, who, without title and without interest in the property, have been permitted by the Arkansas courts to file an alleged "partition" suit, to claim petitioners' property; and said courts have decreed a sale of the property which belongs solely to these petitioners and their brother; all of which has been done without any trial on the merits of the cause and during the absence of petitioner Adam Empie Potts in active military combat service. And yet, because of such military service, this litigant has been insulted gratuitously and stigmatized as one who would make improper use of the Soldiers and Sailors Civil Relief Act! With these facts before it, we believe the Supreme Court of the United States, our Nation's highest tribunal, will not deny *certiorari* when it fully understands the issues involved herein. Will this Court of last resort fail to give relief to these petitioners, who come honorably and in good faith?

In *Boone* v. *Lightner,* 319 U. S. 561, this Court says:

> "As the decision below presented an important question of construction of the Act, we granted *certiorari.*"

Petitioners contend that the instant case of *Potts* v. *Rader* (219 S.W. 2d 769) presents a yet *more important question,* of Nation-wide consequence.

In its opinion in the *Boone-Lightner* case, *supra,* at page 565, this Court says that stay of action must be granted the litigant in the military service "unless, in the opinion of the court, the ability of . . . the defendant to conduct his defense is not materially affected by reason of his military service." But, in the instant case, the trial court had no fact and no evidence on which to base such *opinion* (all the testimony and other evidence showing completely that this service man's ability to defend was *materially affected* by reason of his military service (R. 139; 141; 143; 145; 146; 147); in which case, to deny stay of action as provided by the Soldiers and Sailors Civil Relief Act was a flagrant abuse of the trial court's discretion, was a serious abuse of authority and constituted grave reversible error; and when the Supreme Court of Arkansas refused to consider the testimony favoring the petitioner (R. 185), in the record brought before it *upon its own orders* (R. 159-166; 182) ,and affirmed the obviously erroneous decree of the trial court, such unusual action appears certainly to justify review under the power of supervision to be exercised by the Supreme Court of the United States.

In *Boone* v. *Lightner,* 319 U.S. 561, at 572, this Court said:

"The final question is whether the *evidence* sufficiently supports the *opinion* or whether the order constitutes an abuse of discretion."

Such construction as the Supreme Court of Arkansas placed upon this Court's decision in the *Boone-Lightner* case, *supra*, completely nullifies any and all benefits and protection for any service man under provisions of the Soldiers and Sailors Civil Relief Act—nullifying the Act in such states.

If courts are permitted to commit such abuse of authority, it means simply that, when those enjoying the court's favor wish to acquire some valuable property, all they need do is have the owner inducted into the military service and then bring a suit and have the court's "opinion" decreed in their favor and against the interest of the service man; or, they may select a nice piece of property belonging to one already in the military service.

We realize that there is a Just GOD and retributive justice; and we recognize too that our stewardship on this earth requires also that we exert our very best in conscientious human endeavor. And when people residing in one state own property in another state, their only protection now is the Supreme Court of the United States. Otherwise, without such protection, any claimant may prosecute and sustain any false claim—and the real owners in the distant state have no redress. United States District Courts and Circuit Courts of Appeals have been provided for some such cases; but, since petitioners now are precluded from relief in such courts, the only forum is our Nation's Supreme tribunal.

If state courts of last resort are to be permitted to render decisions arbitrarily upholding the errors of trial courts in inequitable and unjust judgments to favor litigants with invalid claims, and thereby divesting honest people and taking their life's savings or their family inheritances, it may become an abuse of authority so prevalent and so widespread as to cause nation-wide alarm and to constitute a national menace.

What incentive to our military personnel to know that, while they are on active combat duty in the armed forces of the military service, defending our Nation, the state courts are permitting their property to be taken from them in their absence in such military service? What incentive to our People to give enthusiastic support to a Government administration which lives not up to the Constitutional guarantees of the Nation and which affords them little or no protection in their inherent rights?

SUBSTANTIAL JUSTICE is the basis of all Law and Order; and, that such substantial justice be done and that such law and order be not stifled, these petitioners contend that the inequity and injustice of the Arkansas Supreme Court's decision in the matter of *Potts* v. *Rader* (219 S.W. 2d 769) constitutes an error so grave as to merit review and correction by the Supreme Court of the United States as the only tribunal having the power of supervision required to correct such error in state courts of last resort and thereby to secure to military personnel and the general public the due process of law and equal protection under the laws as their inherent rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States of America.

Although the facts of his service are known and proven, yet the courts have shown him no courtesy and no consideration and, furthermore, the opinions of the courts have have placed upon Colonel Potts the insult and the odium of trying to make it appear that he was attempting to make improper use of the immunities provided by the Soldiers and Sailors Civil Relief Act! A gallant and conscientious colonel who has rendered distinguished service, with a brilliant war record, given no protection and shown no consideration whatever, insulted, and wrongfully deprived of his property, during his absence in military service, fighting in defense of Our Nation! Can the Supreme Court of the United States now fail to exercise its power of supervision, that equity and substantial justice may prevail in this case? Does not this situation present sufficiently "special and important reasons" for consideration and for issue of the necessary writ of *certiorari* to review the decision of the Arkansas courts in this matter? Even in the absence of the Soldiers and Sailors Civil Relief Act, would not Public Policy and Public Conscience demand such action? Is not such action now obviously to protect not only the petitioner herein but all other military personnel and everyone generally in similar emergency?

When a litigant in the military combat forces of our Nation has rendered noteworthy service, and when the physical facts and all testimony and all evidence show conclusively that he was and is a necessary witness and that his presence and his testimony and other evidence are needed to protect his own and his brothers' interests in their cause, it is inconceivable that any of our courts would deny to such litigant his day in court, deny him a proper trial on the merits of his cause, and thereby permit his opponents to deprive him of his family inheritance, merely because of such

military service (and on the unsworn, unverified and undeniably prejudiced and obviously incorrect statements of counsel for his opponents).

CONCLUSION

The record shows that the issue involved in this cause is ownership of Sheppard Island Plantation as property belonging solely to these petitioners and their brother, as shown in the answers filed by these petitioners in the trial court (R. 5 to 12), and that the devastavits of A. B. Guigon, Jr., are incidents only. The record shows that, in the entire course of this litigation, only once has any continuance been asked by the petitioners, and that in 1939 (R. 15), without knowing that the case already had been continued by the respondents themselves (then plaintiffs) because of their own internal controversy (R. 12), which was not settled among them until decree on mandate, October 10, 1941 (R. 40). The record shows further that, in the "motion to dismiss" (R. 169 to 182) made and filed by their attorney, the respondents attempted to cloak their own delays and to make them appear as delays caused by the petitioners; but in such "motion to dismiss," respondents have admitted delays "not attributable to James Sheppard Potts" (R. 178, line 30; and R. 180, line 7), which cover the entire course of the litigation and show by respondents' own admissions that *no* delays were attributable to these petitioners; yet the respondents' entire case has been predicated upon the subject of "delays," *for which the respondents themselves admittedly are wholly responsible.* But the record shows also that the decision and opinion of the Arkansas Supreme Court (R. 183 to 187) were not based upon the facts in the record but were based upon respondents' aforesaid "motion to dismiss" and follow the language of said motion (which said motion appears to be

unsworn, unverified as required by statute and by rules of the said court, and the statements in which are obviously incorrect and prejudiced and appear to have been intended to prejudice the court), which said motion appears not to have been lawfully nor properly before the court and should not even have been considered by the court.

The record shows also that petitioners had filed with the Supreme Court of Arkansas a transcript of the complete record as required and in accordance with statute and rules of that court and upon that court's express order *per curiam* (R. 182) in addition to its four writs of *certiorari* (R. 159 to 166), and that under such circumstances, the court had no lawful right to refuse to consider such record in its entirety.

Petitioners contend that this case contains federal questions of the most vital importance, affecting the lives and fortunes of the American People, questions of their inherent Constitutional rights and of Public Policy and military immunities under the Soldiers and Sailors Civil Relief Act, all of which appear to be well defined issues in this case and which appear to present reasons of special importance to the people of our Nation and which justify a writ of *certiorari* by this Honorable Court, as reqeuested herein.

With such facts as these alleged and brought to its attention, surely this Honorable Court will not refuse this opportunity to review such abuse of authority, to protect not only the petitioners but the entire American Public; to accomplish which, this Court very respectfully is urged to issue the necessary writ of *certiorari* to the Supreme Court of Arkansas.

Writ of *certiorari* was denied these petitioners on October

17, 1949; and this Petition for Rehearing and Reconsideration is being filed herein before or by October 31, 1949; copies of same having been forwarded to opposing counsel on October 29, 1949.

Respectfully submitted,

JAMES SHEPPARD POTTS

ADAM EMPIE POTTS

Petitioners

CERTIFICATE OF PETITIONERS

We, the undersigned petitioners in above-entitled cause, hereby certify that the foregoing petition for rehearing and reconsideration is presented in good faith and not for delay and that it is restricted to substantial grounds not previously presented to this Court (any other references being necessarily incidental).

October 29, 1949

JAMES SHEPPARD POTTS

ADAM EMPIE POTTS

145 South Colonial Avenue
Richmond 21, Virginia,

Petitioners

Petitioners

October 28, 1949.